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No. 03-

IN THE

# Supreme Court of the United States

AT&T CORP.,

*Petitioner,*

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN,
ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether fundamental principles of State sovereignty and the Due Process Clause of the Fourteenth Amendment prohibit a state court in Oklahoma from asserting jurisdiction over claims challenging the collection of a municipal sales tax in 27 other states by certifying a class action encompassing the claims of customers from those 27 states.

## CORPORATE DISCLOSURE STATEMENT

Petitioner AT&T Corp. has no parent company and no publicly held corporation owns 10% or more of petitioner's stock.

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**On Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals**

## PETITION FOR WRIT OF CERTIORARI

Petitioner AT&T Corp. respectfully requests that a writ of certiorari issue to review the judgment of the Oklahoma Court of Civil Appeals in this case.

## OPINIONS BELOW

The initial opinion of the Oklahoma Court of Civil Appeals, issued is unpublished and can be found in the Appendix ("App.") at 18a-33a. The opinion on rehearing of the Oklahoma Court of Civil Appeals is also unreported and can be found in the Appendix at 1a-17a. The order of the Oklahoma Supreme Court denying review of the Oklahoma Court of Civil Appeals decision can be found in the Appendix at App. 59a. The Oklahoma district court decision granting respondents' motion for class certification is unpublished and can be found in the Appendix at 34a-58a.

## JURISDICTION

The opinion on rehearing of the Oklahoma Court of Civil Appeals was issued on June 10, 2003. Petitioner timely filed for review with the Oklahoma Supreme Court. A divided Oklahoma Supreme Court denied review, 5 to 4, on September 29, 2003. On December 19, 2003, Petitioner moved for an extension of time to file this Petition for Certiorari. Justice Breyer issued an order granting an extension up to and including January 18, 2004.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. While the decision under review did not terminate the litigation in the state court, the decision is nonetheless "final" for purposes of § 1257 under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

> "[T]he federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and ... reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action ... [and] a refusal immediately to review the state-court decision might seriously erode federal policy...."

*Id.* at 482-83. The federal issue presented here—whether an Oklahoma court has the power to entertain claims arising out of the tax collection process in other States—has been finally decided by the Oklahoma courts. This Court's review at a later date might be prevented if petitioner were to prevail on the merits. Were this Court to hold, as petitioner contends,

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[1] The Clerk's office has confirmed that, because January 18 is a Sunday, and January 19 is a federal holiday, Justice Breyer's order effectively extended the time for filing until January 20, 2004. *See* Sup. Ct. R. 30.1 (the last day "of any period of time prescribed . . . by order of the Court" shall not include any Sunday or federal legal holiday).

that the Oklahoma courts lack the power to entertain such out-of-state tax collection claims, this Court would preclude any further litigation of those non-Oklahoma claims. And, finally, the question of the power of the Oklahoma court to entertain the non-Oklahoma claims implicates the substantial federal policies reflected in the Constitution's Due Process Clause, which requires the Oklahoma court to apply the laws of each customer's State to his or her claim, and its recognition of the sovereignty of each State, which would prohibit one State from interfering with the administration of another State's tax collection scheme.

This Court has not hesitated to review state court decisions, even at an early stage in the proceedings, where, as here, the federal issue presented challenges the power of the state court to hear certain claims at all. See *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963) (although state court had ruled on nothing more than venue, this Court considered whether the state court lacked power to hear the claim in the face of a federal statute requiring the claim to be heard in a different state court venue); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 546-50 (1963) (although state court had simply issued temporary restraining order, this Court considered whether the National Labor Relations Act deprived a state court of jurisdiction to hear a claim seeking a labor injunction); *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984) (reviewing whether a state court had the power to hear a dispute between a franchisor and its franchisees that appeared to be governed by the arbitration provision in the franchise agreement (thus implicating the Federal Arbitration Act), even though the arbitration question was the only issue that had been decided by the state court). As was true in the foregoing cases, the federal issue presented here is a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Mercantile Nat'l Bank*, 371 U.S. at 558, and it would "serve[]

the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now" where the claims should be tried, rather than to subject the parties "to long and complex litigation which may all be for naught if consideration of the preliminary question ... is postponed until the conclusion of the proceedings." *Id.*

## STATEMENT OF THE CASE

This case involves the most fundamental attribute of state sovereignty: the power to administer a tax collection scheme. In the decision below, the Oklahoma Court of Civil Appeals asserted the power to disrupt the administration of the collection of municipal taxes in 27 States beyond Oklahoma. In so ruling, it has arrogated to itself a power that the highest courts of two other States have expressly recognized belongs solely to the taxing State. The New York Court of Appeals squarely rejected the approach taken by Oklahoma here. *City of Phila.* v. *Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962) (stating that "[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State"). And the Arkansas Supreme Court has acknowledged that it lacks authority to order tax refunds in other States. *Ferguson* v. *Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001) (noting that state courts are "without jurisdiction to order the treasuries of other states to refund tax revenues"). It is uniquely the role of this Court to clarify and police the fundamental principles of state sovereignty that require Oklahoma to refrain from adjudicating claims brought by citizens of other States that involve the collection of taxes by those States.

Had the Oklahoma courts given proper respect to the sovereign authority of each State, it would have recognized that the laws of each taxpayer's own State must be applied to his or her claim under this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985). *Shutts* requires

the Oklahoma courts to examine and faithfully apply the laws of the various states that require the claims asserted here to be resolved in special administrative fora. The Oklahoma Court of Civil Appeals refused to do so. This fundamental departure from the decisions of this Court and the conflict with the rulings of other state and federal courts on a matter touching upon the core sovereign powers of the States warrants this Court's review.[2]

## I. Nature of the Action.

The city of Muskogee, Oklahoma requires phone customers to pay a municipal sales tax of 3.25% on long distance calls originating from within the city limits. App. 2a. Respondents, Bobby Gene Allen and Deborah Jane Allen, allege that petitioner charged them for the Muskogee municipal tax even though they live in an unincorporated area outside the city. *Id.* Respondents allege that AT&T's action constituted breach of contract. *Id.* at 3a. In addition to a restitution of municipal taxes paid, respondents sought a declaratory judgment and an injunction prohibiting AT&T from imposing the tax charge where it is not authorized. *Id.*

Respondents have asserted their claims not only on their own behalf, but also on behalf of customers who were charged municipal taxes and who allegedly live outside the taxing jurisdiction of the relevant municipality. Critically, the class respondents sought to certify was not limited to residents of Oklahoma, but extended also to customers in every state where municipalities are permitted to impose sales taxes on long distance telephone calls:

> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York,

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[2] AT&T does not here challenge the authority of Oklahoma courts to resolve the claims brought on behalf of Oklahoma customers regarding the imposition of municipal taxes in Oklahoma.

Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, and Wyoming.

App. 3a. In effect, respondents have sought an order from the Oklahoma court requiring a refund of taxes and an injunction against the imposition of taxes in 27 States in addition to Oklahoma.

**II. State Tax Collection/Refund Procedures.**

At all times relevant to this case, AT&T was and is obligated by law to collect and remit taxes imposed on long-distance telephone service and acts as an agent or trustee for each State or municipality that imposes the tax. In Oklahoma, for example, as a licensed vendor, AT&T holds all taxes collected "in trust" for the State of Oklahoma and, "as trustee, . . . ha[s] a fiduciary duty to the State of Oklahoma in regards to such sums and shall be subject to the trust laws of this state." Okla. Stat. tit. 68, § 1361(F). Other state laws include similar language. See, for example, N.Y. Tax Law § 1132 (a)(1) ("The tax shall be paid to the person required to collect it as trustee for and on account of the state."); Tex. Tax Code Ann. § 111.016(a) (person collecting tax holds it "in trust for the benefit of the state"). In its role as agent or trustee for each State, AT&T is subject to statutory and regulatory requirements governing the collection and remittance of taxes in each State in which it provides long-distance telephone service. Pursuant to the various regulatory requirements, AT&T collects the mandated tax and forwards the funds collected to the appropriate jurisdiction. AT&T retains only a small amount, authorized by the local taxing authority, to cover its costs of maintaining appropriate records of its tax collections on behalf of the municipality.

To fulfill this obligation of identifying the tax liability for millions of customers, since the 1990s AT&T has used state of the art computer software to identify whether a given call was made from within or outside of a municipal taxing

authority. Any error made by the software in determining whether a particular customer is included within a taxing jurisdiction is unintentional and an unavoidable consequence of using the best available technology for the massive task involved. Significantly, the financial benefit of such an error does not run to AT&T because, as noted above, AT&T passes along the tax (minus a small amount to cover its administrative costs) to the appropriate taxing authority.[3]

Taxpayers do not have the same freedom to sue for a refund of taxes erroneously collected, or to enjoin the collection of taxes, as they have to file a garden variety tort suit. Because the various States use vendors such as AT&T as tax collectors, and the vendors do not actually benefit financially from their role as tax collectors, States have established special and exclusive procedures for aggrieved citizens who claim to be wrongly assessed a tax. Those procedures relate both to *where* claims like those asserted by respondents can be brought and against *whom* they may be asserted.

For example, New York has established a tax commission for customers seeking a refund of taxes "erroneously [or] illegally" collected. N. Y. Tax Law § 1139(a). And New York has made clear that the remedies the tax commission is authorized to provide are the exclusive remedies available to customers, going so far as to expressly prohibit injunctions or declaratory judgments of any "proposed determination of tax." *Id.* § 1140. Indeed, in New York, "[a] dissatisfied taxpayer's recourse is ... against the taxing body" not the vendor. *Davidson* v. *Rochester Tel. Corp.*, 558 N.Y.S.2d 1009, 1011 (App. Div. 1990). New York permits judicial review of the administrative body's decision, but only after the customer has exhausted his or her administrative remedies. *Id.*

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[3] As evidence of this emerged in this litigation, respondents abandoned their claims based on allegations that AT&T retained the tax monies.

Texas allows suit in a court, not an administrative body, but it specifies which court. Tex. Tax Code Ann. § 112.001 (Travis County, Texas); *Serna* v. *H.E. Butt Grocery Co.*, 21 S.W.3d 330, 335 (Tex. Ct. App. 2000) (stating that Zavala County district court lacks jurisdiction over suit seeking repayment of allegedly overpaid taxes). Like New York law, Texas law does "not contemplate direct action against the *vendor* who collects the sales tax on the state's behalf." *Id.* at 333. And Texas law specifies who must be sued, Texas Tax Code Ann. § 112.053(a) (the comptroller and the attorney general), prerequisites to suit, *id.* § 112.052 (payment with a notice of protest), and prerequisites for suits seeking an injunction, *id.* § 112.101 (*inter alia*, notice to the attorney general that an injunction will be sought).

Other States included within the scope of the class certified in this case restrict the freedom of taxpayers to sue vendors that have collected taxes on the government's behalf. See, for example, *P.R. Mktg. Group, Inc.* v. *GTE Fla., Inc.*, 747 So. 2d 962 (Fla. Dist. Ct. App. 1999) (holding where a tax refund is claimed on any basis other than the unconstitutionality of the tax, the administrative remedies provided under the Florida Tax Code were exclusive); *McManus* v. *State, Dep't of Revenue & Fin.*, 499 N.W.2d 726, 727 (Iowa 1993) (claimant seeking tax refund must first exhaust administrative remedies); *Parker* v. *Giant Eagle, Inc.*, No. 01 C.A. 174, 2002 WL 31168571, at * 4 (Ohio Ct. App. Sept. 26, 2002) (claim brought by customer against vendor for improperly calculated sales tax must be brought in court of claims and not in court of general jurisdiction); *Heaven* v. *Rite Aid Corp.*, No. 0596, 2000 WL 33711049, at *2 (Pa. Ct. Com. Pl. Oct. 27, 2000) (holding "a purchaser may not bring an individual action or a class action against a vendor for refund of overcharged sales tax, regardless of whether the vendor remitted the overcharge to the Commonwealth, and regardless of whether the vendor acted intentionally or deceptively"). And some States included within the scope of the class

prohibit suits seeking tax refunds from being brought as class actions. *State ex rel. Ellsworth Freight Lines, Inc.* v. *State Tax Comm'n*, 651 S.W.2d 130, 132 (Mo. 1983) ("a class action cannot be used to claim refunds of improperly collected sales taxes") (citing *Charles* v. *Spradling*, 524 S.W.2d 820 (Mo. 1975)); *Hooks* v. *Comptroller of Treasury*, 289 A.2d 332, 333-34 (Md. 1972) (permitting customer to seek refund "in his own behalf" but concluding that there "is no warrant ... permitting him to advance a claim in behalf of others similarly situated").

**III. The Decision Below.**

The Oklahoma Tax Code provides that "[a]ny taxpayer who has paid to the State of Oklahoma, through error of fact, or computation or misinterpretation of law, any tax collected by the Tax Commission may, as hereinafter provided, be refunded the amount of such tax so erroneously paid, without interest." Okla. Stat. tit. 68, § 227(a). Nonetheless, the Court of Civil Appeals in this case determined that any effort by respondents to seek relief through Oklahoma's administrative procedure would be futile. App. 6a-7a. As a result, Oklahoma has decided that respondents' Oklahoma-based claim may be brought in an Oklahoma court of general jurisdiction against a vendor who collects taxes on behalf of the government. The court applied that ruling to citizens and taxpayers in 27 other States.

AT&T does not challenge in this Court the propriety of respondents proceeding in the Oklahoma courts on behalf of themselves and other similarly situated Oklahomans. AT&T does contend, however, that the Oklahoma courts lack jurisdiction over the claims asserted on behalf of non-Oklahoma citizens. Relying on the decisions cited above from New York, Texas and Florida, and this Court's ruling in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), AT&T explained that, before an Oklahoma court certified a multi-state class action covering the claims asserted here, it would have to assure itself that the laws of all the States covered by

the putative class action would permit the claims to be adjudicated against AT&T by an Oklahoma court. AT&T asserted that respondents' inability to make such a showing precluded certification of a multi-state class.

In considering its jurisdiction over the claims in this case, the Oklahoma Court of Civil Appeals examined only Oklahoma law in depth. It noted that "[s]ome jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and held that administrative remedies must be exhausted before judicial relief can be sought." App. 4a-6a (discussing *P.R. Marketing* decision from Florida and *Serna* decision from Texas). Critically, the court's discussion indicated that it looked at these decisions not as binding authority for claims asserted on behalf of Florida and Texas customers, but instead merely as potentially persuasive discussions of the issue from courts that could not bind an Oklahoma court. The court of appeals simply refused to ask whether the laws of the various jurisdictions covered by its certification order would permit this suit to be brought against AT&T in Oklahoma.

Petitioner filed a Petition for Writ of Certiorari with the Oklahoma Supreme Court, arguing, *inter alia*, that the Court of Appeals had unconstitutionally authorized an Oklahoma court's assertion of jurisdiction over claims challenging the collection of taxes in 27 of Oklahoma's sister States. The Oklahoma Supreme Court, in a 5 to 4 decision, denied the request to review this case on certiorari.

## REASONS FOR GRANTING THE WRIT

The power to assess taxes and administer tax laws is an inherent attribute of state sovereignty. By affirming the certification of a multi-state class in this case, the Oklahoma Court of Civil Appeals has intruded upon the sovereignty of 27 of its sister States, disregarding their special procedures for resolving tax related claims and creating the potential that

foreign courts may disrupt the steady flow of finances into their treasuries. The highest courts of two other States have recognized that state courts lack authority to review claims challenging the administration of another State's tax laws. This conflict among the states alone warrants this Court's review. *Smiley* v. *Citibank (S. D.), N.A.*, 517 U.S. 735, 739 (1996) (noting that split of authority among state high courts "prompted [this Court] to take th[e] case").

In addition, the decision under review departs from the approach taken by two federal courts of appeals in cases seeking to certify a multi-state class for claims involving the application of the laws of various States. Applying this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), both the Fifth Circuit and the District of Columbia Circuit have required parties seeking multi-state class certification to demonstrate the compatibility of the various applicable state laws. *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("A district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions."); *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (Ginsburg, J.) (refusing to accept on "faith" representation that any variations in state law are not material and requiring "class action proponents [to] show that it is accurate"). The Oklahoma court imposed no such requirement, and as a result it ignored the legal bars to the claims asserted in this case on behalf of customers in other states. In sum, this Court's review is necessary to clarify the proper respect state courts owe to the various States when addressing their sovereign power to administer their own tax laws.

*1. The Oklahoma Court of Civil Appeals' decision conflicts with the decisions of other state Supreme Courts which have recognized that the exclusive power over the administration of a state's tax laws is a fundamental part of the inherent*

*sovereignty of each State and thus not subject to intrusion by foreign courts.* The New York Court of Appeals has recognized that "[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State." *City of Phila.* v. *Cohen,* 184 N.E.2d 167, 169 (N.Y. 1962). The Arkansas Supreme Court has likewise observed that a state court is "without jurisdiction to order the treasuries of other states to refund tax revenues." *Ferguson* v. *Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001). The Oklahoma Court of Civil Appeals, by certifying a class that sweeps within its jurisdiction the administration of the tax laws of 27 states, has taken a contrary view. The decision below approves a dramatic intrusion on the sovereignty of the States and warrants this Court's review.

The Constitution reserves to the States "a substantial portion of the nation's primary sovereignty, together with the dignity and essential attributes inherent in that status." *Alden* v. *Maine*, 527 U.S. 706, 714 (1999). A primary attribute of the sovereignty of any government is the power to control the flow of finances into and out of state coffers, without which no government can function. This Court has repeatedly recognized the importance of a State's taxing power.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

*Dows* v. *City of Chi.*, 78 U.S. (11 Wall.) 108, 110 (1870). From the earliest days of the republic to the present this Court has consistently acknowledged that "the power to promulgate and enforce ... tax laws is an essential attribute of sovereignty." *Franchise Tax Bd.*. v. *Hyatt*, 123 S. Ct. 1683, 1690 (2003); *Franchise Tax Bd.* v. *United States Postal Serv.*, 467 U.S. 512, 523 (1984) ("'[T]axes are the life-blood of government.'"); *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S.

503, 522 (1981) (referring to "'the imperative need of a State to administer its own fiscal operations'"); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) (noting that the "original right of taxation ... is essential to the very existence of government"). Put simply, it is the gravest of intrusions on the sovereignty of a State for some foreign tribunal to assume the authority to issue orders affecting the administration of the state's tax laws.

The critical importance of leaving the States in control of the administration of their own tax laws had led this Court to "adopt a hands-off approach with respect to state tax administration." *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995). For example, in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), this Court recognized that the States' "exceedingly strong interest in financial stability" warrants setting aside the normal Due Process requirement of the opportunity for predeprivation review when a taxpayer challenges the imposition of a tax as unlawful. *Id.* at 36-37. States have the right to collect taxes as they see fit, and may even employ aggressive procedures to ensure timely payment *before* a dispute is resolved without running afoul of the Due Process Clause. *Id.* at 37.

Similarly, this Court has consistently rejected claims that Section 1983, by virtue of the Supremacy Clause, authorizes courts, whether state or federal, to issue injunctions or provide monetary relief for violations of state tax laws so long as the taxing state itself provides for an adequate remedy. *National Private Truck Council*, 515 U.S. 582 (1995) (holding that state courts have no authority to order declaratory or injunctive relief under § 1983 for allegedly unlawful state taxes so long as adequate remedy exists under state's own law); *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981) (holding that § 1983 does not authorize suit in federal court seeking monetary relief for imposition of allegedly unconstitutional state tax); *Matthews*

v. *Rodgers*, 284 U.S. 521 (1932) (holding that federal courts lack authority to enjoin collection of state taxes alleged to be imposed in violation of the Constitution). This narrow interpretation of § 1983 has consistently been adopted in light of a "scrupulous regard for the rightful independence of state governments ... and a proper reluctance to interfere ... with their fiscal operations." *Id.* at 525; *National Private Truck Council*, 515 U.S. at 589 (stating "we must interpret § 1983 in light of the strong background principle against federal interference with state taxation").[4]

The States' sovereign interest in administering their own tax laws merits as much respect from other state courts as it does from federal courts. "After all, an injunction issued by a state court ... is just as disruptive as one entered by a federal court." *National Private Truck Council*, 515 U.S. at 591. That is why this Court has emphasized that redress for an allegedly unlawful tax, or an unlawfully administered tax, must be sought in the taxing State itself, in accordance with whatever procedures and limitations the State has seen fit to prescribe. *McNary*, 454 U.S. at 116 (stating that "taxpayers must seek protection of their ... rights by state remedies"); *Matthews*, 284 U.S. at 526 (leaving "the aggrieved party ... to [the] remedy in the state courts"). That is why, as noted above, the Arkansas Supreme Court has observed that a state court is "without jurisdiction to order the treasuries of other states to refund tax revenues." *Ferguson*, 37 S.W.3d at 592. And that is also the reason the New York Court of Appeals has recognized that "[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State." *City of Phila.*, 184 N.E.2d at 169.

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[4] Congress, in the Tax Injunction Act, 28 U.S.C. § 1341, has demonstrated that it believes States should enjoy independent control over the administration of their tax schemes by prohibiting federal courts from enjoining the collection of state taxes where the State provides "a plain, speedy and efficient remedy."

In direct conflict with these rulings from the highest courts of its sister States, the Oklahoma Court of Civil Appeals in this case disregarded the fundamental sovereign interests of the 27 other States included within its certification order. Instead of recognizing that its authority is limited to overseeing the collection of sales taxes within Oklahoma alone, the Oklahoma Court of Civil Appeals asserted the authority to provide tax refunds and to enjoin the collection of taxes within the jurisdiction of 27 other States. It did so without regard to the remedies available to taxpayers within those 27 other States. And it offered no explanation to support an Oklahoma court forum to adjudicate the tax dispute at issue here.

Indeed, respondents themselves presented evidence of the dramatic intrusion on state sovereignty their own request entails. Respondents noted that the state of California sued AT&T over the allegedly improper collection of municipal sales taxes in Ventura County, California. AT&T and California entered into a consent decree in that case that requires AT&T to eliminate only those customers that AT&T knows about or by the exercise of reasonable care should have known, to be not subject to the tax. California has thus determined that its tax laws should be administered according to a standard of "reasonable care" in light of existing technology as determined by the State of California and AT&T, and the California court enforcing its injunction if the two parties disagree. By including California within the scope of the class certification ruling in a case in which plaintiffs seek to impose a kind of strict liability obligation, the Oklahoma court has cast doubt on California's exclusive control over its taxing scheme.

The Oklahoma court's intrusion on state sovereignty is subject to remedy only by this Court. The courts of California, or Texas, or New York have no capacity to review the rulings of Oklahoma courts, and thus have no opportunity to protect their own States' sovereign interest in the orderly

administration of their tax laws. This Court's appellate jurisdiction provides the only effective mechanism to vindicate "the Constitution's special concern ... with the autonomy of the individual States within their respective spheres." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 335-36 (1989).

*2. The States' sovereign interests are also threatened by the Oklahoma Court of Civil Appeals' refusal to require respondents to demonstrate that the laws of the various States authorize a court of general jurisdiction to resolve their claims.* As this Court long ago explained, there are "barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities dealing with it do not abound." *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 161 (1914). The clearest of these restrictions, and one which this Court has had occasions to explore, involves the importance of preventing one State from extending its legislative power to other jurisdictions.

In *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), this Court noted that "it follows from ... principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572; *Head*, 234 U.S. at 161 ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State."); *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States."). The Due Process Clause thus prevents a State from exercising "'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson* v. *Employers Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954).

When presented with a request for certification of a multi-state class in a case involving the application of state, not federal, law, the Due Process Clause plays a special role in protecting the sovereign interests of the States. Under this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), a state court may not apply its local law to claims that have no connection whatsoever to the forum State. This Court stressed that a forum State must have "'significant contact or significant aggregation of contacts'" to the claims of each class member (*i.e.*, "contacts 'creating state interests'") in order to ensure that application of the forum State's law is not arbitrary or unfair. *Id.* at 821-22. Kansas, the state court involved in *Shutts*, was held to have no authority to "'abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" *Id.* at 822.

Even if it were appropriate for an Oklahoma court to resolve a dispute regarding the assessment and collection of taxes in another State, under *Shutts* the Oklahoma court would have to apply the laws of each customer's own State to his or her claim. Oklahoma law cannot be extended to cover claims brought on behalf of customers in States outside Oklahoma because there is no connection between those claims and Oklahoma. *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-11 (1981) (acknowledging that "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional"). To ensure that Oklahoma law is not given extraterritorial application, then, the Oklahoma court must acquaint itself with and apply the laws of the various States included within its certification order.

Under similar circumstances, federal courts of appeals have made clear that the burden rests solidly on the party seeking certification to demonstrate whether and how the laws of the various jurisdictions can effectively be applied before certifying a multi-state class. This necessarily involves a

thorough review of the applicable state laws. *Castano*, 84 F.3d at 741 ("A district court's duty to determine whether the plaintiff has borne its burden on class certification requires that a court consider variations in state law when a class action involves multiple jurisdictions."); *Walsh*, 807 F.2d at 1016 (Ginsburg, J.) (refusing to accept on "faith" representation that any variations in state law are not material and requiring "class action proponents [to] show that it is accurate").

The Oklahoma Court of Civil Appeals in this case failed to conduct the required review. Instead, it allowed this case to proceed as a multi-state class based solely on its examination of the Oklahoma Tax Code and without regard to the substantive and procedural jurisdictional problems apparent from a review of the laws of other States. As a consequence, Oklahoma courts will hear tax challenges by some putative class members who paid taxes to States that bar courts of general jurisdiction from hearing such claims, and/or that require such claims be filed in administrative or specialized courts. The Oklahoma court's conclusions that *Oklahoma law* does not limit "pursuit of a remedy against a third party who collected some erroneous amount" of city or municipal sales tax, App. 4a, or that the administrative remedies *Oklahoma law* provides "would likely present an insurmountable barrier to the individual customer seeking redress," *id.* at 6a, provide no justification for ignoring or overriding the contrary judgments of *other* state legislatures and courts.

In fact, several of the jurisdictions included within the certification order reject the approach the Oklahoma courts have adopted for Oklahoma. Pennsylvania, for instance, refuses to allow its courts of general jurisdiction to hear the claims respondents have asserted on behalf of Pennsylvania customers. *Heaven* v. *Rite Aid Corp.*, No. 0596, 2000 WL 33711049 (Pa. Ct. Com. Pl. Oct. 27, 2000). In *Heaven*, the plaintiff alleged that Rite Aid was fraudulently charging its

customers excessive sales tax. The court held that the Pennsylvania tax statutes provided the exclusive remedies for a tax refund and refused to create a common law remedy, notwithstanding the plaintiff's class action allegations:

> The tax code sets forth a comprehensive scheme for collection and refund of sales taxes, including provisions giving the Commonwealth recourse against dishonest vendors. The tax code imposes criminal penalties on vendors who file fraudulent returns. The tax code imposes civil penalties on vendors who underpay or understate sales tax. By enacting this comprehensive scheme, the legislature has vested exclusive jurisdiction over sales tax matters in the Department of Revenue. The court will not create a common law remedy to add to this comprehensive statutory scheme.

*Id.* at *5 (citations omitted). The *Heaven* court rejected the same practicality argument that the Oklahoma court found persuasive.

> The impracticality of requiring all of Rite Aid's overcharged customers to file a petition for a refund does not relieve Heaven of the exhaustion requirement. That impracticality would be relevant to class certification. It would not be relevant to whether Heaven may bring an action at all.

*Id.* at *4 (citations omitted) (citing *Lilian* v. *Commonwealth*, 354 A.2d 250, 254 (Pa. 1976)). Pennsylvania, acting as a sovereign power concerning the manner in which sales taxes are collected, has established an orderly procedure for resolving disputes. The Oklahoma court, ignoring Pennsylvania's sovereign prerogatives, has refused to respect it.

Likewise, the Oklahoma court has refused to respect Texas's choice for resolving tax related claims. *Serna* v. *H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex. Ct. App. 2000). In *Serna,* the plaintiff brought a lawsuit against a grocery store,

alleging that the store fraudulently overcharged state sales tax. The *Serna* court held that because the plaintiff was seeking a refund of overcharged sales tax, the trial court did not have jurisdiction to resolve the case. *Id.* at 336. For the Texas court, unlike the Oklahoma court in this case, it did not matter that the claim was brought against a vendor charged with collecting sales tax; the suit was effectively a challenge to the collection of the tax that ultimately benefited the government. *Id.* at 335 (holding that "this lawsuit ... claiming taxes were collected in an amount greater than the legal rate, actually amounts to a suit for a tax refund as if the suit had been filed against the Comptroller"). The *Serna* court also acknowledged that Texas's procedure for resolving tax related claims reflects a policy judgment on the fundamental issue of how to manage state finances.

> [T]he Comptroller is vested with authority over an administrative mechanism in the Tax Code that makes the most efficient use of the Comptroller's administrative functions in the areas of tax collection and refunds. Allowing parties to circumvent this process undermines the very administrative efficiency that it seeks to achieve.

*Id.* at 334. Despite the clear import of the holding in *Serna*—there is no jurisdiction over respondents' claims asserted on behalf of Texans—the Oklahoma Court of Civil Appeals refused to give *Serna* controlling effect merely because it "did not deal with a class action claim, nor did it involve a claim for injunctive relief." App. 5a.

New York, like Texas and unlike Oklahoma, refuses to allow customers to evade the specialized procedures created to resolve tax claims merely by suing the vendor that collects the tax on behalf of the State. *Davidson* v. *Rochester Tel. Corp.*, 558 N.Y.S.2d 1009 (App. Div. 1990). In *Davidson*, a residential telephone subscriber filed a class action lawsuit against a telephone company, challenging the legality of the company's practice of collecting state sales tax on "'end user

common line'" charges and seeking reimbursement of the charges. *Id.* at 1010. The New York court rejected the claim.

> We concur with RTC's contention that plaintiff has no cause of action against it in that its role in the collection of the sales tax is merely a ministerial act. RTC is designated by law to collect the taxes and as such it has no right to question the underlying validity of the tax but must turn it over to the proper authority. Failure to collect the tax would have exposed RTC to liability and subjected it to possible penalties. Having collected the taxes, RTC's responsibility has ended. A dissatisfied taxpayer's recourse is then against the taxing body.

*Id.* at 1011. (citations omitted).

Florida refuses to allow a court of general jurisdictional to hear a claim for a tax refund, unless the claim asserts that the tax is unconstitutional. *P.R. Mktg. Group, Inc.* v. *GTE Fla., Inc.*, 747 So. 2d 962 (Fla. App. 1999). The *P.R. Mktg.* court acknowledged this rule in a case seeking certification of a state-wide class against a telecommunications company and the Florida Department of Revenue alleging that sales tax had been improperly imposed. As the *P.R. Mktg.* court recognized, "[t]he Florida supreme court ... [had held] that a taxpayer is required to first apply for a refund pursuant to the relevant statute before filing suit," *Id.* at 964, the effect of which is to prevent class certification, at least until all putative class members have sought refunds from the appropriate administrative body. The Oklahoma court in this case apparently believes this requirement is inefficient, App. 5a n.4, and disregarded it.

Because the Oklahoma Court of Civil Appeals failed to follow the procedures specified in *Shutts* and adopted by the Fifth and District of Columbia Circuits, it did not examine the controlling law of the States involved. Had it done so, it would have recognized that the law of numerous jurisdictions prohibits the claims asserted here when brought on behalf of

out-of-state plaintiffs, and denied class certification. Instead, in a decision that conflicts with both federal circuit court and state high-court rulings, the Oklahoma court improperly certified a multi-state class.

* * * *

The certification of this multi-state class action seeking tax rebates and injunctive relief relating to the administration of the tax laws of States beyond Oklahoma strikes at the heart of the relationship among the independent sovereign States that make up the union. This Court's decisions, as well as those of other state Supreme Courts counsel a special respect for the taxing authority, which is a core sovereign power of any State. The Oklahoma Court of Civil Appeals has rejected these precedents by asserting its authority to regulate the tax law in 27 other States. There is no other tribunal in a position to review the approach taken by the Oklahoma courts in this case, and to clarify the proper respect the courts of each State owe sovereign powers of the various States in putative class claims challenging state tax laws.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 20, 2004

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# APPENDICES

**APPENDIX A**

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION II

[Filed June 10, 2003]

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Case No. 97,916
Not for Official Publication

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BOBBY GENE ALLEN and DEBORAH JANE ALLEN,
on behalf of themselves and all others similarly situated,
*Plaintiffs/Appellees*,

vs.

AT&T CORPORATION,
*Defendant/Appellant.*

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APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA

HONORABLE MIKE NORMAN, TRIAL JUDGE

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*OPINION ON REHEARING AFFIRMED*

OPINION ON REHEARING BY RONALD J. STUBBLEFIELD, JUDGE:

This is an appeal by defendant AT&T Corporation from an interlocutory trial court order certifying a class action lawsuit.[1] On March 18, 2003, we issued an opinion affirming the lower court's judgment. However, we have granted rehearing to address an issue raised by Defendant. Based on

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[1] Such an order is appealable by right pursuant to 12 O.S.2001 § 993(6).

additional review of the record on appeal, the issues raised by the parties, and applicable law, we affirm.

## BACKGROUND

Plaintiffs, Bobby Gene Allen and Deborah Jane Allen, a married couple, are customers of AT&T, the telecommunications company. AT&T provides Plaintiffs with their long distance telephone service. Plaintiffs live in an unincorporated area outside the City of Muskogee.

Plaintiffs' lawsuit concerns the validity of a municipal sales tax charge included in their monthly long distance bill. Many cities, including Muskogee, require phone customers to pay this tax, which is separate from the sales tax levied on telephone use by the state. For example, the State of Oklahoma levies a 4.5 percent state sales tax, and the City of Muskogee charges a 3.25 municipal sales tax. Because Plaintiffs live in an unincorporated area outside Muskogee, their long distance charges are subject to the state tax but not the municipal tax.

Plaintiffs asserted that AT&T charged the same municipal tax for all its customers residing in any one zip code, even those customers residing outside city limits. Plaintiffs produced one of their monthly AT&T bills, showing they had been charged the Muskogee municipal sales tax as well as the Oklahoma sales tax. Plaintiffs asserted AT&T was wrongfully collecting this money from nonresidents of any given city, remitting to the taxing authorities the amount properly owed, and pocketing the improperly charged amount "[i]n order to enhance profits and reduce accounting costs." Plaintiffs acknowledged that after contacting AT&T about the problem, they received a one-month credit of 74 cents and were no longer being charged the tax.

Plaintiffs filed their petition, individually and as a class action, seeking damages for restitution, fraud,[2] and breach of contract. Plaintiffs also sought declaratory relief and an injunction prohibiting AT&T from imposing the charge where unauthorized.

AT&T denied charging a flat rate per zip code to its customers, admitting only that a previously-used computer software system had resulted in billing errors, including some related to whether a customer lived inside or outside a city's limits. AT&T asserted it had issued credits to customers who were improperly billed.

AT&T filed a motion to dismiss, asserting that the Trial Court lacked jurisdiction because Plaintiffs did not seek a tax refund from the Oklahoma Tax Commission before filing their lawsuit. The Trial Court denied the motion.

After receiving a good deal of evidence and conducting a hearing, the Trial Court issued a 27-page order granting class certification, with the class defined as:

> All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location where they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
>
> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.[3]

AT&T appeals.

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[2] Plaintiffs did not attempt to certify the fraud claim as part of the class action.

[3] The Trial Court noted these 28 states are the only ones in the United States permitting cities to impose sales tax on long distance calls.

## STANDARD OF REVIEW

In an appeal from a trial court's certification of a class action, our standard of review is whether the trial court abused its discretion. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 4, 689 P.2d 299, 301. Class actions are governed by 12 O.S.2001 § 2023, which specifies five prerequisites for class certification. The trial court abuses its discretion if the record fails to support the conclusion that each of the five prerequisites of that statute is met. *Id.* Those prerequisites are set out and analyzed below.

## DISCUSSION OF ISSUES

### I. Jurisdiction

AT&T first argues, as it did below, that Plaintiffs' lawsuit should be dismissed for failure to exhaust administrative remedies. Plaintiffs did not seek a refund from the Oklahoma Tax Commission (OTC) for any amounts overpaid, and AT&T asserts that because OTC has exclusive jurisdiction over tax refunds, this case must be dismissed for lack of subject matter jurisdiction.

Oklahoma tax statutes do provide a procedure whereby taxpayers who have erroneously paid any tax can seek a refund from OTC and then, if unsuccessful, seek relief from the Oklahoma Supreme Court. However, a reading of the statutes does not reveal a limitation on pursuit of a remedy against a third party who collected some erroneous amount. Indeed, it would appear that claims such as are addressed in this lawsuit would be difficult if not impossible for an individual AT&T customer to pursue. For example, 68 O.S.2001 § 227(c) requires that a claim include specific information that an individual consumer likely would not have.

Some jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and held that administrative remedies must be exhausted before

judicial relief can be sought. The case of *P.R. Mktg. Group, Inc. v. GTE Fla., Inc.*, 747 So. 2d 962 (Fla. Dist. Ct. App. 1999) involved a class action, and the court denied certification because individual consumers did not file an application for refund within a specific time. However, the *P.R. Mktg.* decision was based solely on a rule specified by the Florida Supreme Court.[4]

In *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex. Ct. App. 1999), the Texas Court of Appeals was faced with a case in which a grocery store admittedly overcharged sales tax to customers and then remitted the collected money, including the overage, to the State. The court held that under the Texas Tax Code a customer's exclusive remedy was to proceed through administrative channels. However, *Serna* did not deal with a class action claim, nor did it involve a claim for injunctive relief. Furthermore, a principal rationale in the *Serna* Court's decision was the possibility of numerous

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[4] The Court in *P.R. Mktg.* actually pronounced a rather harsh judgment on its decision dictated by *stare decisis*, stating:

> We are compelled to take note of the resources that may be wasted as a result of this outcome. In a case where a tax refund may affect a significantly large number of individuals, it seems impractical to require every taxpayer to file a refund application with the DOR [the taxing authority] and be denied that refund before being able to join a class action. This may leave the DOR inundated with applications and would require it to spend a significant amount of time and resources on this unvaried type of claim. Alternatively, many customers may not know that the possibility of a tax refund may exist or may not even attempt to file for a refund since their personal claim may be a nominal amount. In that case, either GTE or the DOR may be able to realize a windfall by simply taxing each customer a mere one percent more than what they are legally allowed to do, if the appellants' allegations are indeed true, without anyone knowing of a possible refund nor requesting a refund. Regardless of the potential ramifications as it applies to this case, we must follow the supreme court's holding on this matter.

*P.R. Mktg.*, 747 So. 2d at 965.

lawsuits and inconsistent verdicts, which is actually an argument in favor of class action.[5]

AT&T claims that the evidence is that it remitted all the monies that were claimed to be overcharges to the taxing authorities, and, therefore, Plaintiffs and every other individual customer must seek refund of the overpayment directly from those authorities. However, the record indicates that AT&T's corporate policy is to refund any overcharges directly to the individual consumer—in this instance they made a partial refund to Plaintiffs. And it seems certain that many, if not most of the customers of AT&T who may have been overcharged would not know that they had been wronged. Even those that did likely would not be able to prove individual claims before OTC or other taxing authorities without access to AT&T records. Thus, the administrative remedies, which AT&T claims must be pursued, would likely present an insurmountable barrier to the individual customer seeking redress. In cases in which exhaustion of remedies is not required by statute, the requirement to exhaust administrative remedies is a prudential rule, rather than a jurisdictional bar. *Waste Connections, Inc. v. Oklahoma Dept. of Environmental Quality*, 2002 OK 94, ¶ 0, 61 P3d 219, 221. "Administrative remedies need not be exhausted if they would be ineffective, unavailable or futile to pursue." *Id.*

The question is one of jurisdiction. Did the Trial Court have jurisdiction to proceed even though Plaintiffs had not pursued an administrative remedy? Our preceding analysis leads us to conclude that the administrative remedy is effectively unavailable to these Plaintiffs as well as to the myriad

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[5] *The Serna* Court stated: "If H.E.B. had overcharged customers in several counties of this state, and the customers filed suit in their respective local district courts, the results from one trial court to another could be inconsistent. Such disparate outcomes would be unfair both to the aggrieved taxpayers as well as the state." *Serna*, 21 S.W. 3d at 334.

of other potential plaintiffs. But an even more important reason for finding that the Trial Court had jurisdiction is that a primary purpose of Plaintiffs' cause is to obtain injunctive relief, as authorized under 12 O.S.2001 § 2023(B)(2), to prevent AT&T from continuing to use practices that have resulted in considerable overpayment by customers. The administrative remedy would do nothing to prevent AT&T from continuing to use procedures which resulted in overcharge of its customers and, thus, is insufficient as a remedy. We conclude, under the facts of this case, that the Trial Court had jurisdiction to hear Plaintiffs' lawsuit.

## II. The Class Action

### A. Prerequisites

Title 12 O.S.2001 § 2023 states as follows:

> A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> 1. The class is so numerous that joinder of all members is impracticable;
>
> 2. There are questions of law or fact common to the class;
>
> 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> 4. The representative parties will fairly and adequately protect the interests of the class.
>
> B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:
>
> * * * *
>
> 2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular form, and

d. the difficulties likely to be encountered in the management of a class action.

AT&T asserts that none of the five prerequisites were met.

B. Numerosity

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." 12 O.S.2001 § 2023(A)(1). The Oklahoma Supreme Court has stated that this requirement is satisfied by numbers alone where the size of the class is in the hundreds. *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, ¶ 17, 969 P.2d 337, 343.

The Trial Court noted in its order that AT&T, through its responses to interrogatories and the testimony of its tax director, conceded that its former zip code system used to determine local taxes was inadequate, and that new software installed in the mid-1990's indicated over a million residential customers had been improperly billed for city

taxes, resulting in overcharges of $5,000,000. The Trial Court accordingly found that this element was indisputably present and easily satisfied.

Certainly, the size of the proposed class meets the pre-requisite of numerosity. In fact, AT&T does not argue that the sheer number of potential plaintiffs identified in the class does not meet this requirement. Instead, AT&T argues that the class has not been adequately defined, as numerosity requires. *See, e.g., KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶ 15, 9 P.3d 683, 689. AT&T asserts that it will be difficult to identify class members, because individualized inquiries will have to be made to determine where calls originate and where customers reside.

In part, this argument is based on AT&T's "two out of three" method used to determine whether city sales tax applies. Under this method, as AT&T's tax director testified, the tax is due when two out of three factors in any call take place in a city limits: (1) the origination point (where the call is made); (2) the termination point (where the call is received); and (3) the service location, or service address (generally defined as the location of the telephone equipment from which a call is originated or, in the case of collect calls, received). AT&T asserts, for example, that when an out-of-city residential customer uses a calling card from an in-city location, individualized customer records will have to be examined to determine if the tax is due.

We disagree with AT&T's argument for several reasons. First, as a practical matter, this appears to be no more a problem than in other consumer class actions, in which prospective members are identified through receipts, bills, or customer records. Given the detailed information provided in the AT&T bills submitted into the record, and AT&T's own detailed customer information system, we do not see this as a reason to defeat certification. The Trial Court's order, in fact, notes the testimony of the tax director to the effect that

identification of class members could be accomplished using AT&T's existing information.

Second, the Trial Court's order appears to minimize some of the problems associated with identification. It limits the class to customers making long distance calls "from their service location," which would by definition be calls made from outside a city limits.

Third, the facts of the instant case are clearly different than those in *KMC*, upon which AT&T relies. *KMC* involved an action filed by purchasers of the Aero Commander aircraft. There, the Supreme Court concluded, "There is no single course of conduct by appellees alleged to have caused injury and it is impossible for claims to be based upon one legal theory as to all appellees." *Id.* at ¶ 16, 9 P.3d at 689. In contrast, Plaintiffs assert AT&T committed a single course of conduct that injured everyone in the class in the very same way. We conclude the record supports the finding of numerosity.

C. Commonality

Commonality requires that there are "questions of law or fact common to the class." 12 O.S.2001 § 2023(A)(2). There is little question that this requirement is satisfied. Each potential class member is a customer of AT&T; each resides outside a city limit; each has allegedly been wrongly billed for a municipal tax; and each has allegedly been damaged in an identical manner by identical acts committed by AT&T. Whether AT&T acted tortiously, and whether it is liable for its acts, are common questions. The Trial Court addressed this prerequisite in its order as follows:

> As the Federal court noted in its order remanding this case, the crux of this case is whether individuals living in an unincorporated area outside of the limits of any city are subject to a charge by AT&T for a municipal sales tax on their phone bill. This is the one overwhelming central issue for all Class members.

According to AT&T, this requirement cannot be met because the Trial Court would be faced with a series of individualized questions regarding where each class member lived and how different states and local jurisdictions might treat the phrase "service location." We fail to see the logic of this argument. Determining whether a customer resides inside or outside the city limits is not a matter dependent on differing state laws. Also, the laws of the various states are similar in that it appears the city tax, wherever applied, never applies to anyone residing outside the city limits.[6]

Furthermore, an analysis of fairly recent cases supports the correctness of the Trial Court's decision regarding commonality. In *Bunch v. KMART Corp.*, 1995 OK CIV APP 41, 898 P.2d 170, the Court of Civil Appeals held that plaintiffs could not satisfy the commonality prerequisite as to common questions of fact (because each plaintiff would have to prove reliance) or of law (because different states had significant differences in their substantive law of fraud).

*Bunch* was subsequently distinguished by the Oklahoma Supreme Court in *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, 939 P.2d 337, which involved "clearly different and more uniform actions." *Id.* at ¶ 30, 939 P.2d at 345. In *Black Hawk*, the defendants allegedly failed to account for slop oil in monthly accountings rendered by them to a specific class of oil producers. The court quoted *Newberg on Class Actions* for the principle that "[t]he need to show individual reliance has not precluded class treatment in cases where standardized written misrepresentations have been made to class members." *Id.*

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[6] For these reasons, we cannot agree with AT&T that a conflict of law problem exists at this stage of the proceedings. Under general conflict of law principles, where the laws of two or more jurisdictions would produce the same result as to the particular issue presented, there is a "false conflict" and the court should avoid the choice of law question. *Williams v. Stone*, 109 F.3d 890, 893 (3rd Cir. 1997).

Of course, the instant case does not involve a fraud theory. We mention *Bunch* and *Black Hawk* to contrast the differences among cases analyzing the commonality requirement. Certainly the facts of the instant case are closer to *Black Hawk's* facts. As in *Black Hawk*, the instant case involves standardized monthly accountings, in the form of AT&T monthly bills which either do or do not charge a customer a city tax.

Finally, there is evidence in the record indicating similarities among all the states as far as Plaintiffs' theories of restitution and breach of contract are concerned. We conclude the commonality prerequisite was satisfied.

D. Typicality

Typicality requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. 12 O.S.2001 § 2023(A)(3). This requirement is satisfied "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented . . . irrespective of varying fact patterns which underlie individual claims," *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. Ct. App. 1995), quoting *Newberg on Class Actions.*

The Trial Court noted in its order that Plaintiffs are AT&T customers residing outside the municipal limits of a city who were billed for and paid a municipal tax. The order further noted that they asserted that AT&T was required to charge the correct amount of tax to all customers and to refund any improperly-collected tax (retained by AT&T). The Trial Court concluded, "This core claim will be the same for all class members with an incorrect OCL [Outside City Limits] indicator."

We agree. Typicality focuses on the similarity of the legal and remedial theories behind the class members' claims.

*Lobo Exploration Co. v. Amoco Prod. Co.*, 1999 OK CIV APP 112, ¶ 17, 991 P.2d 1048, 1055. Plaintiffs' legal theories of recovery arise from allegations of the same course of conduct equally affecting Plaintiffs and the members of the putative class. These allegations form the basis of a common theme found in Plaintiffs' claims and render those claims typical of the class.

AT&T asserts the claims of Bobby Allen are not typical in that he has no relationship with AT&T. This argument appears to be based on the fact that Mr. Allen's name does not appear on the monthly bills Plaintiffs receive from AT&T. The Trial Court dealt with this argument by correctly recognizing that Mr. Allen is married to co-plaintiff Deborah Allen, whose name does appear on the bill; that he is equally liable for the bills sent by AT&T; *and that the evidence indicated AT&T treated him as an account holder.*

AT&T also asserts that Deborah Allen's claims are not typical because, as a former AT&T employee, she received some discounts from the company. The Trial Court noted that the record did not indicate any discount affected whether Mrs. Allen was charged a municipal tax. We agree with the Trial Court's analysis.

AT&T further argues Plaintiffs' claims are not typical of the class because, following their complaint about paying municipal taxes, Plaintiffs received a credit and no longer are billed for the tax. However, it appears the credit was for one month only and there has been no showing that Plaintiffs received a credit for all months in which they paid the alleged improperly charged tax.

Finally, AT&T asserts that the tax laws of each state reveal variations in the limitations period regarding tax refunds, rendering the claims of these Oklahoma residents atypical. We find the argument without merit because, as reasoned above, this is not an action to obtain a state sales tax refund.

However, if the Trial Court later determines unique defenses exist, it can use its power to modify its order as necessary. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 17, 689 P.2d 299, 304. We conclude the typicality prerequisite was satisfied.

E. Adequacy of Representation

This prerequisite requires that the class representatives will fairly and adequately protect the interests of the class. 12 O.S.2001 § 2023(A)(4). Class representatives are required to have a "general understanding of their position as plaintiffs with respect to the cause of action and the alleged wrongdoing perpetrated against them by the defendants." *Kalodner v. Michaels Stores, Inc.*, 172 F.R.D. 200, 209 (N.D. Tex. 1997).

Some of AT&T's arguments on this point are repetitive of earlier arguments we have considered and rejected. AT&T also asserts Plaintiffs will not be able to adequately represent the class because they lacked personal knowledge of their claims and abdicated their role to their attorneys.

As the Trial Court did, we reject this argument. At the core of this case are some basic assertions: Plaintiffs were billed for a tax; the tax is owed by residents of a municipality; Plaintiffs live outside the municipality. The Trial Court order indicates Plaintiffs understand the basic, consumer-oriented issues involved. Plaintiffs indicated they were able to identify the tax, calculate its amount, and complain to AT&T that they did not live within the taxable area. Contrary to AT&T's arguments there is no requirement that class representatives must have knowledge of the law governing telecommunication taxes or AT&T procedures. The record does not demonstrate that Plaintiffs lack personal knowledge of the underlying circumstances of the lawsuit. To the contrary, it indicates they possess the required knowledge to satisfy this prerequisite.

F. Predominance and Superiority

As a prerequisite to a class action, predominance—found at 12 O.S.2001 § 2023(B)(3)—requires the trial court to examine whether individual questions *preclude* the common questions of law or fact from being *predominant. Mattoon v. City of Norman*, 1981 OK 92, ¶ 18, 633 P.2d 735, 739.

AT&T first asserts that individual questions of fact predominate because individual analysis is required of potential class members' bills. At this stage of the proceedings, however, the record indicates that AT&T's computer software will allow such an analysis. Moreover, to deny certification on this point would be tantamount to closing the courthouse doors to any claim that involved large numbers of consumers. One of the reasons behind the existence of class action lawsuits, after all, is to assure that plaintiffs with claims too small to pursue individually will receive their day in court. *See Phillips Pet. Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 2973 (1985).

AT&T also asserts individual questions of law predominate because different tax rates will be involved, depending on what each state allows its cities to levy. We do not view this as justification for decertifying the class. AT&T does not assert that any jurisdiction allows the collection of a municipal tax from those customers who reside and make calls from their service location outside a city limits. And the question of what municipal taxes AT&T actually charged members of the class also seems likely to be determined from information in AT&T's computer database.

AT&T also asserts the Trial Court will be forced to survey all of the pertinent states' statutes of limitations to determine whether each putative class member's claims are timely under his or her applicable state's limitations period. However, the existence of individual statutes of limitations defenses is not a factor that generally finds favor with courts considering

certification. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶ 16, 689 P.2d 299, 304. If a sufficient number of individualized issues emerge with respect to the limitations issue, the Trial Court has the option of modifying or even decertifying the class. At this stage of the proceedings, the limitations issue is not a sufficient ground for denying certification.

Title 12 O.S.2001 § 2023(B)(3) also requires the trial court to find that the class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. AT&T argues that class treatment is not superior to other methods, primarily because the task of administering a case involving such a potential large number of members would overwhelm the resources of the Trial Court.

In determining the superiority of a class action, a trial court is required to balance the benefits the class action has over alternative methods of adjudicating the claims against the management problems which may arise from class treatment. *Lobo Exploration Co. v. Amoco Prod. Co.*, 1999 OK CIV APP 112, ¶ 15, 991 P.2d 1048, 1054. As the Trial Court did in the instant case, the *Lobo* trial court reasoned that each individual claim would be small (around one dollar a month for each plaintiff) relative to the costs of litigating the claim. The Court of Civil Appeals stated:

> Therefore, individual litigation of their claims would be difficult or impossible for the members and would substantially increase the burden on the court system. [The trial court] concluded the litigation was more manageable as a class action than if undertaken individually, even though management problems would arise. We find no abuse of discretion in the trial court's action.

*Id.*

In its order, the Trial Court referred to *Lobo* and concluded, "Considering the extremely low amount of damages suffered by each individual class member, a class action is effectively

the only way such a case could be successfully adjudicated." We find no fault with the Trial Court's reasoning.

G. Declaratory Relief

Title 12 O.S.2001 § 2023(B)(2) allows the class to seek injunctive relief, where the prerequisites of subsection A are satisfied and where "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." AT&T asserts that if relief is appropriate, it is through money damages and not declaratory/injunctive relief.

According to the Trial Court, "[t]he primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future." The question of whether a court should grant declaratory relief goes to the appropriateness of that particular procedure or remedy for the particular controversy. *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶ 6, 850 P.2d 1069, 1073. In this instance, if Plaintiffs' claims are true and the conduct at the heart of the lawsuit is ongoing, then it may be appropriately addressed by declaratory relief. However, at this stage of the proceedings, it is simply too early to determine potential relief. Those are matters for the Trial Court to consider at the proper time and not here in the certification phase.

CONCLUSION

We hold that the Trial Court had jurisdiction over the matter, and did not abuse its discretion in certifying this case as a class action.

AFFIRMED.

TAYLOR, P.J., and GOODMAN, J. (sitting by designation), concur.

June 10, 2003

**APPENDIX B**

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION II

[Filed Mar. 18, 2003]

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Case No. 97,916
Not for Official Publication

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BOBBY GENE ALLEN and DEBORAH JANE ALLEN,
on behalf of themselves and all others similarly situated,
*Plaintiffs/Appellees*,

vs.

AT&T CORPORATION,
*Defendant/Appellant.*

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APPEAL FROM THE DISTRICT COURT OF
MUSKOGEE COUNTY, OKLAHOMA

HONORABLE MIKE NORMAN, TRIAL JUDGE

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*AFFIRMED*

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OPINION BY RONALD J. STUBBLEFIELD, JUDGE:

This is an appeal by defendant AT&T Corporation from an interlocutory trial court order certifying a class action lawsuit.[1] From review of the record on appeal and applicable law, we affirm.

BACKGROUND

Plaintiffs, Bobby Gene Allen and Deborah Jane Allen, a married couple, are customers of AT&T, the telecom-

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[1] Such an order is appealable by right pursuant to 12 O.S.2001 § 993(6).

munications company. AT&T provides Plaintiffs with their long distance telephone service. Plaintiffs live in an unincorporated area outside the City of Muskogee.

Plaintiffs' lawsuit concerns the validity of a municipal sales tax charge included in their monthly long distance bill, Many cities, including Muskogee, require phone customers to pay this tax, which is separate from the sales tax levied on telephone use by the state. For example, the State of Oklahoma levies a 4.5 percent state sales tax, and the City of Muskogee charges a 3.25 municipal sales tax. Because Plaintiffs live in an unincorporated area outside Muskogee, their long distance charges are subject to the state tax but not the municipal tax.

Plaintiffs asserted that AT&T charged the same municipal tax for all its customers residing in any one zip code, even those customers residing outside city limits. Plaintiffs produced one of their monthly AT&T bills, showing they had been charged the Muskogee municipal sales tax as well as the Oklahoma sales tax. Plaintiffs asserted AT&T was wrongfully collecting this money from nonresidents of any given city, remitting to the taxing authorities the amount properly owed, and pocketing the improperly charged amount "[i]n order to enhance profits and reduce accounting costs." Plaintiffs acknowledged that after contacting AT&T about the problem, they received a one-month credit of 74 cents and were no longer being charged the tax.

Plaintiffs filed their petition, individually and as a class action, seeking damages for restitution, fraud,[2] and breach of contract. Plaintiffs also sought declaratory relief and an injunction prohibiting AT&T from imposing the charge where unauthorized.

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[2] Plaintiffs did not attempt to certify the fraud claim as part of class action.

AT&T denied charging a flat rate per zip code to its customers, admitting only that a previously-used computer software system had resulted in billing errors, including some related to whether a customer lived inside or outside a city's limits. AT&T asserted it had issued credits to customers who were improperly billed.

AT&T filed a motion to dismiss, asserting that the Trial Court lacked jurisdiction because Plaintiffs did not seek a tax refund from the Oklahoma Tax Commission before filing their lawsuit. The Trial Court denied the motion.

After receiving a good deal of evidence and conducting a hearing, the Trial Court issued a 27-page order granting class certification, with the class defined as:

> All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location where they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
>
> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.[3]

AT&T appeals.

## STANDARD OF REVIEW

In an appeal from a trial court's certification of a class action, our standard of review is whether the trial court abused its discretion. *Shores v. First City Bank Corp.*, 1984

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[3] The Trial Court noted these 28 states are the only ones in the United States permitting cities to impose sales tax on long distance calls.

OK 67, ¶4, 689 P.2d 299, 301. Class actions are governed by 12 O.S.2001 § 2023, which specifies five prerequisites for class certification. The trial court abuses its discretion if the record fails to support the conclusion that each of the five prerequisites of that statute is met. *Id.* Those prerequisites are set out and analyzed below.

## DISCUSSION OF ISSUES

### I. Jurisdiction

AT&T first argues, as it did below, that Plaintiffs' lawsuit should be dismissed for failure to exhaust administrative remedies. Plaintiffs did not seek a refund from the Oklahoma Tax Commission. (OTC) for any amounts overpaid, and AT&T asserts that because OTC has exclusive jurisdiction over tax refunds, this case must be dismissed for lack of subject matter jurisdiction.

Oklahoma tax statutes do provide a procedure whereby taxpayers who have erroneously paid any tax can seek a refund from OTC and then, if unsuccessful, seek relief from the Oklahoma Supreme Court. See 12 O.S.2001 §§ 227 and 228. The Supreme Court has stated that an action for a refund of rates which a consumer believes are excessive is a matter in which a state agency has exclusive jurisdiction, *Wilson v. Harlow*, 1993 OK 98, ¶25, 860 P.2d 793, 800-01 (an action between a utility company and the OTC). Furthermore, several other jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and have held that administrative remedies must be exhausted before judicial relief can be sought. *See P.R. Mktg. Group, Inc. v. GTE Fla., Inc.*, 747 So.2d 962 (Fla. Dist. Ct. App. 1999), which involved a class action; and *Davidson v. Rochester Tel. Corp.*, 558 N.Y.S.2d 1009 (N.Y. App. Div. 1990). In *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex. App. 1999), the Texas Court of Appeals was faced with a case in which a grocery store admittedly overcharged sales

tax to customers and then remitted the collected money, including the overage, to the State. The court held that a customer's exclusive remedy was to proceed through administrative channels.

There is one fundamental difference between the facts of these cases requiring the pursuit of an administrative remedy, and the allegations of this case. In those cases requiring exhaustion of administrative remedies, the wrongly collected taxes had been remitted to the taxing authority. Thus, in each case, the "beneficiary of the sales tax windfall" was the state involved. *Serna* at 335.

In contrast, Plaintiffs' claim is that AT&T collected municipal sales taxes, not as trustee for the city or state, but wrongfully *kept the money for itself.* Plaintiffs have no complaint with the fact that the tax exists, or that the tax is fixed at a certain rate, or that cities are entitled to receive the tax. They maintain that their dispute is not with the State of Oklahoma nor with OTC, because those entities do not have their money.

We find this distinction to be crucial. AT&T's argument that Oklahoma law forbids a consumer from directly suing a vendor to recover money paid as a tax misses the point of Plaintiffs' lawsuit. It is this element of Plaintiffs' claim—that the monies they seek, on their own and on behalf of others, were never received by the taxing authority—which distinguishes the case. AT&T's argument also ignores language in the Oklahoma statutory administrative remedy providing for refunds where a taxpayer "has paid to the State" an erroneous amount of tax. 68 O.S.2001 § 227(a). If the facts alleged by Plaintiffs are true, then AT&T's argument would require taxpayers to seek refund from the State of monies never received by the State. Clearly, that is not the intent of the law.

In short, because Plaintiff's' lawsuit seeks money allegedly held by AT&T, and not money paid to the State, Plaintiffs were not required to exhaust administrative remedies.

II. The Class Action

A. Prerequisites

Title 12 O.S.2001 § 2023 states as follows:

> A. PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> 1. The class is so numerous that joinder of all members is impracticable;
>
> 2. There are questions of law or fact common to the class;
>
> 3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> 4. The representative parties will fairly and adequately protect the interests of the class.
>
> B. CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subsection A of this section are satisfied and in addition:
>
> * * * *
>
> 2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> 3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members,

and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

c. the desirability or undesirability of concentrating the litigation of the claims in the particular form, and

d. the difficulties likely to be encountered in the management of a class action.

AT&T asserts that none of the five prerequisites were met.

B. Numerosity

Numerosity requires that the class be "so numerous that joinder of all members is impracticable." 12 O.S.2001 § 2023(A)(1). The Oklahoma Supreme Court has stated that this requirement is satisfied by numbers alone where the size of the class is in the hundreds. *Black Hawk Oil Co. v. Exxon Corp.*, 1998 OK 70, ¶17, 969 P.2d 337, 343.

The Trial Court noted in its order that AT&T, through its responses to interrogatories and the testimony of its tax director, conceded that its former zip code system used to determine local taxes was inadequate, and that new software installed in the mid-1990's indicated over a million residential customers had been improperly billed for city taxes, resulting in overcharges of $5,000,000. The Trial Court accordingly found that this element was indisputably present and easily satisfied.

Certainly, the size of the proposed class meets the prerequisite of numerosity. In fact, AT&T does not argue that the sheer number of potential plaintiffs identified in the class does not meet this requirement. Instead, AT&T argues that the class has not been adequately defined, as numerosity requires. *See, for example, KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶15, 9 P.3d 683, 689. AT&T asserts that it will be difficult to identify class members, because individualized inquiries will have to be made to determine where calls originate and where customers reside.

In part, this argument is based on AT&T's "two out of three" method used to determine whether city sales tax applies. Under this method, as AT&T's tax director testified, the tax is due when two out of three factors in any call take place in a city limits: (1) the origination point (where the call is made); (2) the termination point (where the call is received); and (3) the service location, or service address (generally defined as the location of the telephone equipment from which a call is originated or, in the case of collect calls, received); AT&T asserts, for example, that when an out-of-city residential customer uses a calling card from an in-city location, individualized customer records will have to be examined to determine if the tax is due.

We disagree with AT&T's argument for several reasons. First, as a practical matter, this appears to be no more a problem than in other consumer class actions, in which prospective members are identified through receipts, bills, or customer records. Given the detailed information provided in the AT&T bills submitted into the record, and AT&T's own detailed customer information system, we do not see this as a reason to defeat certification. The Trial Court's order, in fact, notes the testimony of the tax director to the effect that identification of class members could be accomplished using AT&T's existing information.

Second, the Trial Court's order appears to minimize some of the problems associated with identification. It limits the class to customers making long distance calls "from their service location," which would by definition be calls made from outside a city limits.

Third, the facts of the instant case are clearly different than those in *KMC*, upon which AT&T relies. *KMC* involved an action filed by purchasers of the Aero Commander aircraft. There, the Supreme Court concluded, "There is no single course of conduct by appellees alleged to have caused injury and it is impossible for claims to be based upon one legal theory as to all appellees." *Id.* at ¶16, 9 P.3d at 689. In contrast, Plaintiffs assert AT&T committed a single course of conduct that injured everyone in the class in the very same way. We conclude the record supports the finding of numerosity.

C. Commonality

Commonality requires that there are "questions of law or fact common to the claims." 12 O.S.2001 § 2023(A)(2). There is little question that this requirement is satisfied. Each potential class member is a customer of AT&T; each resides outside a city limit; each has allegedly been wrongly billed for a municipal tax; and each has allegedly been damaged in an identical manner by identical acts committed by AT&T. Whether AT&T acted tortiously, and whether it is liable for its acts, are common questions. The Trial Court addressed this prerequisite in its order as follows:

> As the Federal court noted in its order remanding this case, the crux of this case is whether individuals living in an unincorporated area outside of the limits of any city are subject to a charge by AT&T for a municipal sales tax on their phone bill. This is the one overwhelming central issue for all Class members.

According to AT&T, this requirement cannot be met because the Trial Court would be faced with a series of individualized questions regarding where each class member lived and how different states and local jurisdictions might treat the phrase "service location." We fail to see the logic of this argument. Determining whether a customer resides inside or outside the city limits is not a matter dependent on differing state laws. Also, the laws of the various states are similar in that it appears the city tax, wherever applied, never applies to anyone residing outside the city limits.[4]

Furthermore, an analysis of fairly recent cases supports the correctness of the Trial Court's decision regarding commonality. In *Bunch v. KMART Corp.*, 1995 OK CIV APP 41, 898 P.2d 170, the Court of Civil Appeals held that plaintiffs could not satisfy the commonality prerequisite as to common questions of fact (because each plaintiff would have to prove reliance) or of law (because different states had significant differences in their substantive law of fraud).

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[4] For these reasons, we cannot agree with AT&T that a conflict of law problem exists at this stage of the proceedings. Under general conflict of law principles, when the laws of two or more jurisdictions would produce the same result as to the particular issue presented, there is a "false conflict" and the court should avoid the choice of law question. *Williams v. Stone*, 109 F.3d 890, 893 (3rd Cir. 1997).

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We agree. Typicality focuses on the similarity of the legal and remedial theories behind the class members' claims. *Lobo Exploration Co. v. Amoco Prod. Co.*, 1999 OK CIV APP 112, ¶17, 991 P.2d 1048, 1055. Plaintiffs' legal theories

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Some of AT&T's arguments on this point are repetitive of earlier arguments we have considered and rejected. AT&T also asserts Plaintiffs will not be able to adequately represent the class because they lacked personal knowledge of their claims and abdicated their role to their attorneys.

As the Trial Court did, we reject this argument. At the core of this case are some basic assertions: Plaintiffs were billed for a tax; the tax is owed by residents of a municipality; Plaintiffs live outside the municipality. The Trial Court order indicates Plaintiffs understand the basic, consumer-oriented issues involved. Plaintiffs indicated they were able to identify the tax, calculate its amount, and complain to AT&T that they did not live within the taxable area. Contrary to AT&T's arguments there is no requirement that class representatives must have knowledge of the law governing telecommunication taxes or AT&T procedures. The record does not demonstrate that Plaintiffs lack personal knowledge of the underlying circumstances of the lawsuit. To the contrary, it indicates they possess the required knowledge to satisfy this prerequisite.

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ine whether individual questions *preclude* the common questions of law or fact from being *predominant*. *Mattoon v. City of Norman*, 1981 OK 92, ¶18, 633 P.2d 735, 739.

AT&T first asserts that individual questions of fact predominate because individual analysis is required of potential class members' bills. At this stage of the proceedings, however, the record indicates that AT&T's computer software will allow such an analysis. Moreover, to deny certification on this point would be tantamount to closing the courthouse doors to any claim that involved large numbers of consumers. One of the reasons behind the existence of class action lawsuits, after all, is to assure that plaintiffs with claims too small to pursue individually will receive their day in court. *See Phillips Pet. Co. v. Shutts*, 472 U.S. 797, 809, 105 S. Ct. 2965, 2973 (1985).

AT&T also asserts individual questions of law predominate because different tax rates will be involved, depending on what each state allows its cities to levy. We do not view this as justification for decertifying the class. AT&T does not assert that any jurisdiction allows the collection of a municipal tax from those customers who reside and make calls from their service location outside a city limits. And the question of what municipal taxes AT&T actually charged members of the class also seems likely to be determined from information in AT&T's computer database.

AT&T also asserts the Trial Court will be forced to survey all of the pertinent states' statutes of limitations to determine whether each putative class member's claims are timely under his or her applicable state's limitations period. However, the existence of individual statutes of limitations defenses is not a factor that generally finds favor with courts considering certification. *Shores v. First City Bank Corp.*, 1984 OK 67, ¶16, 689 P.2d 299, 304. If a sufficient number of individualized issues emerge with respect to the limitations issue, the Trial Court has the option of modifying or even decertifying

the class. At this stage of the proceedings, the limitations issue is not a sufficient ground for denying certification.

Title 12 O.S.2001 § 2023(B)(3) also requires the trial court to find that the class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. AT&T argues that class treatment is not superior to other methods, primarily because the task of administering a case involving such a potential large number of members would overwhelm the resources of the Trial Court.

In determining the superiority of a class action, a trial court is required to balance the benefits the class action has over alternative methods of adjudicating the claims against the management problems which may arise from class treatment. *Lobo Exploration Co. v. Amoco Prod. Co.*, 1999 OK CIV APP 112, ¶15, 991 P.2d 1048, 1054. As the Trial Court did in the instant case, the *Lobo* trial court reasoned that each individual claim would be small (around one dollar a month for each plaintiff) relative to the costs of litigating the claim. The Court of Civil Appeals stated:

> Therefore, individual litigation of their claims would be difficult or impossible for the members and would substantially increase the burden on the court system. [The trial court] concluded the litigation was more manageable as a class action than if undertaken individually, even though management problems would arise. We find no abuse of discretion in the trial court's action.

*Id.*

In its order, the Trial Court referred to *Lobo* and concluded "Considering the extremely low amount of damages suffered by each individual class member, a class action is effectively the only way such a case could be successfully adjudicated." We find no fault with the Trial Court's reasoning.

G. Declaratory Relief

Title 12 O.S.2001 § 2023(B)(3) allows the class to seek injunctive relief, where the prerequisites of subsection A are satisfied and where "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." AT&T asserts that if relief is appropriate, it is through money damages and not declaratory/injunctive relief.

We have examined Plaintiffs' amended petition. Regarding this remedy, the amended petition simply seeks a judicial declaration as to the validity of the tax as to class members. According to the Trial Court, "The primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future."

The question of whether a court should grant declaratory relief goes to the appropriateness of that particular procedure or remedy for the particular controversy. *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶6, 850 P.2d 1069, 1073. In this instance, if Plaintiff's claims are true and the conduct at the heart of the lawsuit is ongoing, then it may appropriately be addressed by declaratory relief. However, at this stage of the proceedings it is simply too early to determine potential relief. Those are matters for the Trial Court to consider at the proper time and not here in the certification phase.

CONCLUSION

We hold that the Trial Court did not abuse its discretion in certifying this case as a class action.

AFFIRMED.

COLBERT, V.C.J., and TAYLOR, P.J., concur.

March 18, 2003

**APPENDIX C**

IN THE DISTRICT COURT IN AND FOR
MUSKOGEE COUNTY,
STATE OF OKLAHOMA

[Filed May 31, 2002]

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Case No. CJ-99-2168
Class Action

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BOBBY GENE ALLEN and DEBORAH JANE ALLEN,
on behalf of themselves and all others similarly situated,
*Plaintiffs*,

v.

AT&T CORPORATION,
*Defendant.*

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*ORDER GRANTING CLASS CERTIFICATION*

This cause is before the Court on Plaintiffs' Motion for Class Certification. This Court has reviewed and considered all of the pleadings in this matter, the parties' respective briefs, the documents, presentations, admissions, witness testimony and arguments received in evidence during the class certification hearing commenced on March 18, 2002. Additionally, this Court has considered the post-certification submissions. The foregoing information has been duly considered by this Court in performing its rigorous analysis of the facts as they pertain to class certification. This Court now enters this Order Granting Class Certification as follows:

*PROCEDURAL POSTURE*:

On December 9, 1999, Bobby Gene Allen filed his Petition in the District Court in and for Muskogee County, Oklahoma, on behalf of himself and those similarly situated seeking

relief from Defendant's improper collection of money under the guise of a municipal or city sales tax on his telephone bill because he lives in an unincorporated area outside the limits of any city and is not responsible for paying such a tax. The Petition requested, a declaratory judgment, an injunction, restitution for money had and received, and damages for fraud and breach of contract. Plaintiffs seek certification of their injunctive and declaratory judgment claims pursuant to § 2023(B)(2), and certification of their restitution claims for money had and received and breach of contract pursuant to § 2023(B)(3).

On January 5, 2000, Defendant filed its answer to Plaintiff's Petition. On January 14, 2000, Defendant filed its notice of removal contending that Plaintiff's claims arise under the Communications Act of 1934 or are completely preempted by federal law. Additionally, defendants presented sworn testimony that the cost of compliance with the declaratory and injunctive relief would exceed $100,000,000, which, it argued, met the amount in controversy requirements for diversity jurisdiction. The federal court rejected both of Defendant's arguments and remanded the case.

Defendant fled its first Motion to Dismiss arguing that this Court lacked jurisdiction over the subject matter, the complaint failed to state a claim, and preemption under the Communications Act of 1934. Primarily, the Defendant asserted that the Oklahoma Tax Commission has exclusive jurisdiction over the claims made by Allen and that Allen was required to exhaust administrative remedies before filing suit. This Court denied the motion after briefing and a full hearing on the matter. Extensive discovery was conducted. The parties exchanged documents, responded to interrogatories, and took depositions.

Plaintiff Bobby Gene Allen amended his Complaint to add his wife, Deborah Jane Allen, as an additional named plaintiff. An evidentiary hearing on class certification was

held on March 18, 2002. Plaintiffs sought to certify their declaratory judgment and injunctive claims pursuant to § 2023(B)(2) and their breach of contract and money had and received claims pursuant to § 2023(B)(3). Plaintiffs did not attempt to certify their fraud claim.

*FACTS*:

AT&T is the world's largest long distance carrier with over 80 million customers. Through the mid 1980's, AT&T provided 100% of the long distance service in the United States of America. Eventually, federal legislation required competition to be introduced into the long distance market. Despite the introduction of other carriers in Oklahoma and elsewhere, AT&T still serves over 38% of all residential and business long distance customers in the United States.

AT&T bills its customers for and collects sales tax in Oklahoma and in other states that collect sales tax on telecommunication services. Although the rules for application of sales tax to a given service can vary dependent on several factors, long distance service provided to a customer at his service location is a simple determination based on the rate that applies to that customer's physical location. The correct use or sales tax rate for each jurisdiction is publicly available information published by the Departments of Revenue in each state.

These tax rates vary according to the jurisdiction in which the customer resides. There are local taxing authorities within each state that may require remittance of local sales tax in addition to state sales tax. This additional local sales tax is imposed by municipal authorities and may differ from jurisdiction to jurisdiction throughout the state.

AT&T has a proprietary billing system which identifies each of its customer's accounts with a particular "geo-code" or designation which identifies what tax rate should be systematically applied to the long-distance charges made

from the service location on each customer's bill. When AT&T's system incorrectly categorizes an account as being within the city limits, a city tax is applied to all long distance calls made from that customer's service address. AT&T has an "Outside City Limits" or "OCL" indicator which tells AT&T's system to charge city tax to the customer if the indicator is marked "N" meaning the customer is not outside the city limits. Conversely, if the OCL indicator is marked "Y," then the customer is categorized as living outside city limits and is not charged the city tax. For example, a resident of the City of Muskogee is required to pay a 4.5% state sales tax and an additional 3.25% Muskogee city sales tax for a combined tax rate of 7.75%. If that citizen were an AT&T customer, their OCL indicator should be marked "N" because they do not reside outside the city limits of Muskogee and all the long distance calls made from their service location should be charged 7.75%. In comparison, an AT&T customer who resides in an unincorporated area outside Muskogee city limits is required to pay the Oklahoma state sales tax of 4.5% but is not legally obligated to pay the Muskogee city sales tax of 3.25%, and their OCL indicator should be marked "Y." This case concerns AT&T customers who live outside the city limits of thousands of cities across the country but are being charged city tax. In other words, AT&T has incorrectly marked their OCL indicator as "N" when it should be marked "Y."

Sometime between 1995 and 1997, AT&T identified thousands of its residential customers who were overcharged in this manner and provided a partial refund. Importantly, AT&T only attempted to refund current residential customers of AT&T for amounts overcharged. It did not attempt to refund the overcharge to former AT&T customers or to businesses that were overcharged. AT&T claims and collects reimbursement from the taxing authorities for amounts it refunds to customers as incorrectly collected.

On March 21, 1996, Plaintiffs received a phone bill from AT&T representing that they owed AT&T $25.90 for charges before taxes and owed state and local taxes of $1.98. This figure included state sales tax at 4.5% of $25.90 or $1.17 as well as Muskogee city sales tax of $.84 or 3.25% of $25.90. However, the Allens live outside the city limits of Muskogee and should not have been charged Muskogee city tax.

Mr. Allen testified that he periodically reviewed his telephone bill and noticed the local tax. Believing that the bill was improperly charging him for city tax, Mr. Allen contacted AT&T to correct the problem on more than one occasion. AT&T continued to charge Mr. Allen for Muskogee city tax through 1999. After additional complaint, AT&T refunded one month of overcharge to the Allens. AT&T's stated corporate policy and practice is to refund all amounts over-collected from a customer back to the inception of the account.

*THE CLASS DEFINITION*:

Plaintiffs redefined the Class at the class certification hearing as follows:

> All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location when they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:
>
> Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.

*NUMEROSITY*

Oklahoma Pleading Code § 2023(A)(1) requires that the proponent of a class action demonstrate that "the class is so numerous that joinder of all members is impracticable." "The numerosity test is satisfied by numbers alone when the size of the class is in the hundreds." *Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337 (Okla. 1998). Plaintiff offered evidence through discovery documents produced by AT&T that AT&T incorrectly billed and collected money from thousands of individuals as a "local tax" or a "city tax" but which was not due and owing because those individuals did not reside within the incorporated local taxing jurisdiction.

First, in AT&T's responses to interrogatories and through the testimony of Elizabeth Bopp, one of AT&T's corporate representatives, AT&T testified that it knew the zip code based system (Vertex) it was using to determine local taxes was inadequate. This inadequacy prompted AT&T to augment both its residential and commercial billing systems with new software (Vality and Group One respectively) beginning in 1996 and completed in 1998. After incorporating the additional software, AT&T testified that it performed a "scrub" of existing residential accounts which identified over a million residential customers that were improperly billed for city taxes. Plaintiffs also offered summaries from the scrub evidencing that over $5,000,000 was improperly billed and collected by AT&T.

Second, Plaintiffs presented documents demonstrating that there were numerous business and residential customers who complained of improper application of city taxes on their bills after the AT&T scrub which indicates that the problem has not been resolved. These customers were from within the state of Oklahoma as well as several of the other states identified in the class definition including, Illinois, California, Ohio, Arkansas, Washington and Florida.

Pursuant to documents also proffered by the Plaintiffs, AT&T is already subject to a permanent injunction regarding the activity complained of in this lawsuit issued by a California state court. In that suit, AT&T was permanently enjoined and restrained from billing for, or collecting a tax for a particular jurisdiction which it knows or should know is not subject to such a tax. AT&T was also ordered to maintain appropriate corrective measures to accurately determine the applicable tax for each of those customers. That case was limited to a particular jurisdiction. While AT&T claims that the technological improvements it made between 1996 and 1998 have largely corrected the OCL problem, the California injunction issued in the year 2000 and constitutes evidence to the contrary. Thus, there is substantial evidence which indicates that AT&T's alleged corrective measure did not eliminate the problem and that there are still thousands of accounts that are potential class members.

Next, AT&T has so many customers that the admitted error rate of its system results in a huge group of individuals who would be members of the class as defined. Plaintiffs showed an admitted 2% error rate presented by the third party vendor currently supplying the geo-code software to AT&T. Because AT&T is estimated to have between 80 and 90 million customers, there are currently hundreds of thousands of customers who are not billed correctly when the applicable 2% error rate is considered.

Finally, at the Defendant's insistence, Plaintiffs presented the Court with copies of two additional bills, one from a residential customer and one from a business customer, which appear to assess Muskogee city tax to accounts whose address places them clearly outside the city limits of Muskogee.

AT&T contends that individualized factual determinations must be made to determine which calls were made from each class member's "service location" and that such an inquiry precludes a finding of numerosity. While this argument may

address the predominance or commonality requirement as to the degree of individualized inquiry required to determine refunds to potential class members, it does not address Plaintiffs' showing of numerosity. There was substantial evidence presented by Plaintiff to show that there are a large number of customers who have been wrongfully labeled as living inside city limits when, in fact, they do not.

From these facts and others presented at the class certification hearing, this Court finds that it is indisputable that joinder of all members of the class would be impracticable and thus, the numerosity requirement is easily satisfied under the proposed Class definition.

*COMMONALITY*

Oklahoma Pleading Code § 2023(A) does not require that all questions be common or that common questions predominate. Indeed, in the court's § 2023(A) inquiry, a single common question is sufficient to satisfy this requirement. *See Perry v. Meek*, 618 P.2d 934 (Okla. 1980). Here, commonality exists among Class members because the claims of each potential Class member relate to a systematic overcharge made in an identical manner. The questions of law and fact common to the Class include, among others:

What are AT&T's obligations with respect to customers who have been charged for city tax but who do not live inside the city limits?

Does AT&T's practice of setting the default on its billing system to charge for city tax when the customer's exact location is uncertain result in improper charges?

Does AT&T have a duty to inquire of its customers whether or not their service location is outside or inside the city limits?

As the Federal court noted in its order remanding this case, the crux of this case is whether individuals living in an unincorporated area outside of the limits of any city are

subject to a charge by AT&T for a municipal sales tax on their phone bill. This is the one overwhelming central issue for all Class members.

Plaintiffs demonstrated that their claims against AT&T arise from the same set of alleged operative facts that would create a claim for any class member who lives outside city limits but is being charged a city tax on calls made from their service location. Whether AT&T should know precisely where its customers are located and whether AT&T is required to inquire directly of its customers whether they are located inside the city limits are questions that are due to be determined on a class basis. Forcing thousands of individuals to file identical individual actions for such small amounts of damages would burden the courts unnecessarily. It is unlikely that those individuals would have discovered their legal rights and retained counsel willing to pursue such small claims on an individual basis, in any case.

AT&T contends that there are no common issues because the taxability of each and every call is an individualized inquiry that necessarily requires the examination of a host of particular facts as well as the applicable laws of each state. This position is simply not supported by the facts. First, when Plaintiffs put AT&T on notice that he was being overcharged AT&T did not undertake any such analysis in correcting his account. AT&T admits in its brief that it investigated, "issued a refund for the city tax and adjusted its billing system so that [the account] would not be assessed city taxes on any direct-dial calls made after that date." Plaintiffs also offered documentary evidence that changing AT&T's "OCL indicator" to the correct position will remedy the problem complained of in this lawsuit by applying the correct rate to all future calls. Numerous AT&T documents state: "If a customer lives outside the city limits this indicator should be populated with a Y and therefore, this customer will not be charged the city tax."

Furthermore, the evidence presented showed that AT&T was able to identify customers overcharged in this manner and make refunds in the past without the alleged individualized inquiry it now claims is necessary. The internal "scrub" performed by AT&T simply determined which accounts were changed from inside city limits to outside city limits. AT&T determined from that information which customers were incorrectly charged and due a refund. Accordingly, there is not merit to its argument now that individualized determinations will defeat commonality.

Defendant argued that the potential class could not be identified. Yet AT&T's corporate representative, Elizabeth Bopp, testified on her direct examination at the class certification hearing that it is possible for all potential class members to be identified as follows:

Q (By Mr. McKinney) Ms. Bopp, would it be possible for Plaintiffs today to identify the identities or names and addresses of possible persons outside of the city limits who might be charged a city tax?
A For the current period?
Q Yes.
A I'm sure we could identify the customers that have OCL indicators that have theirs set.
Q Okay.
A Whether it was through mailing or calling customers. Through the current customer base absolutely, yes.
Q Okay. Would every customer have an OCL setting on his or her records?
A It would be either yes or no. I am not aware of any blanks.

As a result, the identification of the class members is possible and supports class certification.

AT&T attempted to overcomplicate this case by including circumstances not contemplated by this proposed class. AT&T, both in its brief and at the certification hearing,

continually refers to situations such as calling card calls which, they allege, would require a call-by-call analysis in order to determine whether the customer was improperly charged city tax. Such facts are not contemplated by the amended class definition which only encompasses calls made from the service location. AT&T representatives testified that calls made with calling cards and calls made from the service location have different identification numbers which enables AT&T to determine how they should be billed. The Defendant cannot insert facts and issues into the case by attempting to broaden the reach of the claims as advanced by the Plaintiffs in order to defeat class certification. The proposed class focuses solely on the systematic application of a city tax to direct dial long distance calls made from the actual service location of the customer which, according to AT&T's own documents, can be corrected by changing the OCL indicator. There is no need to look at each individual call to determine whether a customer is inside or outside the borders of a city and to have that OCL indicator corrected. Therefore, the Defendant's allegation that an individual analysis of each call is required is not supported by any evidence and does not rebut the showing made by Plaintiffs that common issues of law and fact exist.

Likewise, AT&T insists that an individual analysis of different tax laws is necessary for each jurisdiction. AT&T did not explain how the tax codes impact the analysis nor did it produce any documents or tax codes to support its position. Plaintiffs' expert contends that the rate charged by each local taxing jurisdiction is the only difference applicable to the overcharge complained of in this case and therefore, it is not necessary to examine tax laws to determine class membership. His argument is premised on the fact that persons identified as living outside the city limits who were charged a city tax on all of their long distance service were categorically overcharged. The issue is merely whether the customer lives within or without the city limits. Such an analysis does not

require the examination of any individual tax laws. AT&T's expert merely made blanket assertions that there are significant variations in tax laws, but failed to provide any analysis or factual support for how and why variations would impact Plaintiffs' claims. Accordingly, this Court finds that common questions of law and fact exist in this action and support class certification.

*TYPICALITY*

Typicality is not a high threshold. *Lobo Explorations Co. v. Armoco Productions*, 991 P.2d 1048, 1055 (Okla. Ct. App. 1999). The measure of whether a plaintiff's claims are typical is whether the nature of plaintiff's claims, judged from both a factual and legal perspective, are such that in litigating his personal claims, he can reasonably be expected to advance the interest of absent class members. *Scott v. University of Delaware*, 601 F.2d 76, 84 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979).

In this case, Mr. and Mrs. Allen are AT&T customers who reside outside of the municipal limits of the City of Muskogee, Oklahoma but who were billed for and paid money to AT&T for Muskogee city taxes for a number of years. Plaintiffs presented evidence in the form of deposition testimony and billing statements demonstrating that the Allens are current AT&T customers and that they have not discontinued their relationship with AT&T at any time. The Allens claim that AT&T is required to charge the correct amount of tax to all customers and to refund any amounts collected improperly. This core claim will be the same for all class members with an incorrect OCL indicator. Thus, Plaintiffs assert that their claims are typical of those advanced by the Class.

AT&T argues that the Allen's claims are not typical on two grounds. First, AT&T argues that Bobby Jean Allen is not a typical class representative because the account was listed in

the name of his wife "DJ Allen" who was not the original named Plaintiff in this action. Defendant asserts that Mr. Allen is not a party to the "contract" between Mrs. Allen and AT&T and is not a real party in interest to this litigation, much less a typical plaintiff. The Allens are a married couple who are both liable for and pay the bills sent by AT&T. Testimony offered by defense witnesses and Plaintiffs show that AT&T treated Mr. Allen as an account holder when he called AT&T. Despite the fact that Mr. Allen's name never appeared on the bill, AT&T regularly discussed the Allen's account with him and made changes to the account based on discussions solely with him. Based on these facts, this somewhat technical distinction is irrelevant given that Mrs. Allen is named as an additional Plaintiff who seeks to represent the Class along with her husband.

Defendant's arguments against the typicality of Mrs. Allen are also unpersuasive. AT&T initially argues that Mrs. Allen is not a typical Plaintiff due to some discounted rates the Allens receive due to Mrs. Allen's former employment with AT&T. However, this distinction does not impact the nature of the claims advanced in the lawsuit in any way. Defendants failed to present any evidence that the Allens received discounts from AT&T, let alone that the discount would impact the nature of the claims as advanced.

Finally, Defendant argues that because Mrs. Allen was not brought in as a named Plaintiff until more than two years after AT&T corrected their account, her fraud claims are barred by the statute of limitations. This argument does not affect this Court's Order on class certification because Plaintiffs are not seeking certification of their fraud claim.

Thus, from both a factual and legal perspective, the Allens can reasonably be expected to advance the interests of the absent class members. This Court finds the claims of the representative Plaintiffs to be typical of the claims of the Class as required under § 2023(A)(3).

*ADEQUACY OF REPRESENTATION*

The Adequacy inquiry of § 2023(A)(4) focuses on whether the representative parties will fairly and adequately protect the interest of the Class. *Blackhawk v. Exxon*, 969 P.2d 337 (Okla. 1998). This analysis requires a two-fold inquiry. First, the Court must determine whether the Allens will adequately represent the Class. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2nd Cir. 1968). Second, the Court must determine whether counsel for the class is capable of effectively litigating the claims on behalf of the Class. *Id.*

In this case, there is nothing to suggest that the Allens have any interest antagonistic to the claims advanced on behalf of the Class. To the contrary, the deposition testimony of the named Plaintiffs shows they are familiar with the claims advanced in this litigation and are fully prepared to vigorously pursue the litigation on behalf of the Class. Both Plaintiffs testified that they understand the nature of the claims, what the lawsuit is about and the basic tenants of class action representation.

Defendant argues that the Allens are inadequate Class representatives because they have failed to exhaust administrative remedies before the Oklahoma Tax Commission. This Court previously rejected Defendant's characterization of this lawsuit as a claim for a tax refund in its rejection of AT&T's Motions to Dismiss. This is the law of the case. Defendant cannot change the character of Plaintiffs' case by defining the alleged overcharge as a tax. In this Court's view, the Defendant's arguments raised on the Motions to Dismiss which mirror the argument against adequacy are untenable. The amounts charged were not a "tax" simply because AT&T charged such amounts under the guise of a tax. Because this is not an action for a tax refund, Plaintiffs were not required to pursue any administrative remedies before any tax com-

mission prior to filing this action. Defendant has presented no evidence demonstrating that these Plaintiffs are inadequate as a result of not pursuing the alleged administrative remedies.

AT&T also contends that the Allens are inadequate representatives because they "lack the requisite knowledge to pursue their claims against AT&T on behalf of absent class members." In support of its position, AT&T cites *Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405 (W.D. Okla. 1990), which held that a total lack of knowledge of the facts underlying a securities fraud class action made the named class representatives inadequate. In *Kelley*, the deposition testimony of the named plaintiffs showed that they had no personal knowledge of basic facts of the case. *Kelley*, 139 F.R.D. at 410. One named plaintiff in *Kelley* stated that all his knowledge of the case came from his attorney whom he contacted on the advice of his broker before he had any knowledge of any wrongdoing by the defendant. *Id.* Such facts cannot be compared to this case. Mr. Allen explained in his deposition how he calculated the overcharge for city tax on his phone bill and how he complained to AT&T based on his knowledge that he should not be charged Muskogee city tax when he does not live within the city limits of Muskogee. Mr. Allen contacted his attorney based on his belief that he was due a refund for all improper overcharges and that he believed a similar overcharge may be occurring elsewhere. AT&T acknowledges Mr. Allen's complaint and states that the Allens account was "corrected" based on Mr. Allen's call. Both the Allens testified that they believe that they should not be charged Muskogee city tax because they live outside the city. These facts are the basis of the complaint in this action. AT&T contends that the Allens need to have specific knowledge and understanding of the telecommunications industry as well as the various applicable tax laws in order to be adequate class representatives under the rationale set forth in *Kelley*. Such an interpretation of *Kelley* is not consistent with the opinion and not applicable to the facts of this case.

The Court in *Kelley* found a "total lack of personal knowledge" of the claims submitted by the plaintiffs. *Id. Kelley* does not require total understanding of every legal aspect of the case at AT&T suggests, but merely that they understand the claims advanced. The Allens have clearly shown that they understand the basics of the claims advanced and they have stated that they are prepared to vigorously pursue the litigation on behalf of the class.

In addition, AT&T argues that the Allens have abdicated their role as named plaintiffs to their attorneys because the Allens did not appear in person at the class certification hearing. AT&T did not subpoena the Allens and was given the opportunity to postpone the hearing so that they could be present. AT&T declined the Court's offer and elected to proceed without the Allens being present. Plaintiffs presented the deposition testimony of both named Plaintiffs in support of their class certification presentation. AT&T had ample opportunity to question the Allens in deposition where each stated that they recognize their duty to represent the class. The attorneys' decision to present testimony through deposition and affidavit at the class certification hearing does not render the Allen's inadequate class representatives.

Finally, this Court notes that Plaintiffs have retained counsel highly experienced in class action litigation to prosecute their claims. Plaintiffs' counsel has been appointed class counsel in successful consumer litigation in numerous states, including the State of Oklahoma. Defendant does not challenge their ability to adequately represent the Class in this litigation.

Accordingly, because the representative Plaintiffs will adequately represent the interests of the Class, have no interest antagonistic to the Class, and have retained counsel well versed in class action litigation, this Court finds that the adequacy requirement of § 2023(A) has also been established.

*THE REQUIREMENTS OF § 2023(B)*

In addition to the requirements of § 2023(A), the case must meet the requirements of at least one of the three subsections of Oklahoma Pleading Code § 2023(B). *See also Blackhawk*, 969 P.2d at 343. Courts also recognize the possibility that more than one alternative under § 2023(B) may be applicable. *See In re A.H. Robins Co., Inc.*, 880 F.2d 709, 747-48 (4th Cir. 1989) (*quoting* 7A C. Wright, A. Miller and M. Cain, *Federal Practice and Procedure: Civil 2nd* at 425).

Plaintiffs seek certification of their declaratory and injunctive claims pursuant to § 2023(B)(2), and certification of their money had and received and breach of contract claims pursuant to § 2023(B)(3). After analyzing this case, this Court finds that it complies with the requirements of two of the three subsections of § 2023(B) and may be appropriately certified under both subsections.

*Oklahoma Pleading Code. § 2023(B)(2)*

Oklahoma Pleading Code § 2023(B)(2) applies to cases in which "the party opposing the class has acted or refused to act on a ground generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that Plaintiffs contend that Defendant erroneously charged and collected money under the guise of a local sales tax. Plaintiffs contend money collected, or a portion thereof, was unauthorized by law and, therefore is to be returned to the consumer. Defendant contends that customers who it overcharges in this respect have no right to a refund unless and until they file a claim for a refund with the governing agency that regulates taxes in each state. Plaintiffs desire a declaration as to the validity of the charge and contend that the law of the case has already determined that this case does not involve a tax

refund because, by definition, the class members could not have owed any such tax. A judicial declaration is necessary and appropriate at this time so that Plaintiffs may ascertain their rights and duties, and those of other affected persons in regard to the appropriateness of the charge at issue.

This lawsuit also requests that Defendants be forced to delineate the amount being charged as a city tax and properly label the charge on the bill as a separate amount so that errors can more readily be detected by customers. Furthermore; Plaintiffs request that AT&T be required to disgorge all monies collected under the guise of a local tax that AT&T knew or should have known were not a tax along with interest thereon. Plaintiffs seek an injunction directing AT&T to contact each current customer and inquire of the customer whether they are located inside or outside the city limits. Plaintiffs also seek to enjoin AT&T from having its OCL indicator default set as N which causes additional unnecessary overcharges. Finally, Plaintiffs seek a permanent injunction prohibiting Defendants from further engaging in the wrongful conduct complained of herein. The primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future.

Accordingly, this Court finds that the primary relief requested by this lawsuit is primarily injunctive or declaratory in nature making class certification appropriate pursuant to Oklahoma Pleading Code § 2023(B)(2).

*Oklahoma Pleading Code § 2023(B)(3)*

Plaintiffs also seek certification of an "opt out" class pursuant to § 2023(B)(3), which states certification is appropriate when:

> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a

class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(g) the interest of the members of the class in individually controlling the prosecution or defense of separate actions,

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

(a)c the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

(d) the difficulties likely to be encountered in the management of a class action.

Okla. Stat. Ann. Tit. 12 § 2023(B)(3) (1991).

This subsection requires two basic findings: (1) that common questions of law and fact predominate (commonly referred to as "predominance"); and (2) that a class action is superior to other forms available for fair and efficient adjudication (commonly referred to as "superiority"). Okla. Stat. Ann. Tit. 12, § 2023 (1991). *See Lobo Exploration*, 991 P.2d at 1052 at 491. Both findings simply call for a qualitative and relative analysis of the case. *See Matton v. City of Norman*, 633 P.2d 735, 739 (Okla. 1981)(predominance "is a qualitative rather than a quantitative matter.")

*Predominance*

The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, and focuses on the relationship between the common and individual issues. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998). As previously demonstrated under the 23(A) inquiry, the legal issues involved in this action are

virtually identical as they pertain to each member of the Class since the core liability issues are based upon the same course of conduct by the Defendant. At the center of this case is AT&T's billing procedures. Regardless of minor variations in the factual circumstances of the absent class members, if AT&T's billing procedures are demonstrated to be flawed as they pertain to the Allens, then the class action mechanism will serve to adjudicate this issue for thousands of people. Each Class member paid money to AT&T under the guise of a local tax when they were not legally required to pay that fee because they do not reside within the city limits. AT&T employs the same software system with respect to identifying what amount to charge each customer for local taxes throughout the country.

As further proof that common questions predominate, this Court notes that other cases have been certified regarding precisely the same conduct. In *Jordan v. SkyMall*, CJ-98-208, District Court of Cherokee County, a sister Oklahoma trial court entertained an analogous class action. There, the plaintiff brought common law claims grounded in restitution, fraud, declaratory judgment, and breach of contract for SkyMall's alleged collection of a sales tax which was unauthorized in connection with merchandise purchased by the class from SkyMall's in-flight catalog company. That case was certified as a class action on a nationwide basis. The trial court necessarily found *SkyMall* to have met the predominance requirement of § 2023.

Defendant argues that individual issues preclude a finding of predominance because, they contend, individual factual determinations regarding individual calls and individual tax statutes from each taxing jurisdiction are required to determine whether each class member has a claim. However, AT&T failed to cite any statute where city taxes can be applied to customers living outside the city limits of the taxing jurisdiction. Plaintiffs' amended class definition includes

only those customers who are charged a fee for city taxes on calls made from their service location when that service location is outside the city limits of the jurisdictional rate applied by AT&T. Calls made from the service location can be identified through AT&T's billing software. Plaintiffs presented a trial plan wherein notice would be sent to all AT&T customers currently listed as living inside city limits. Each customer incorrectly listed could then be identified. Absent class members are often identified through precisely this same process. Once identified, a refund calculation can be easily made. AT&T has not shown how or why further "interpretation" of tax laws is necessary once it has been determined that the class member lives outside the city limits of a given city and has been charged a fee under the guise of the city tax.

Accordingly, this Court finds that common questions in this case predominate over any individual questions relating to members of the Class in that, if the common questions are not answered favorably to the Class, any potential individual questions will never arise.

*Superiority*

The named Plaintiffs aver that Defendant owes them restitution for any amounts wrongfully collected under the guise of a city sales tax along with interest or other benefits accrued thereon. Using the named Plaintiffs' claim as a benchmark, under $12.00 was overcharged to the Allens each year. The vast majority of individual class members are likely to also have substantially small claims. It is clear that most individual claims are not sufficiently substantial to support individual litigation. Oklahoma courts have readily acknowledged that class certification should be granted in situations where a class action would achieve economies of time, effort, and expense. *Lobo*, 991 P.2d at 1052. Considering the extremely low amount of damages suffered by each individual class member, a class action is effectively the only way such

a case could be successfully adjudicated. "The pragmatically correct action, in the face of a close question as to certification, has been said to sustain certification because if it develops later during the course of the trial that the order is ill-advised, the order is always (prior to judgment on the merits,) subject to modification." *Perry v. Meek*, 618 P.2d 934, 939 (Okla. 1980).

Furthermore, the policies underlying the rationale for class action treatment of "negative value" suits are the same polices at issue in the present case. By allowing plaintiffs with small individual claims to join together in one action, particularly where the claims involve a common issue of liability, courts promote efficiency and judicial economy, eliminate the risk of inconsistent or conflicting results, and provide plaintiffs with their only realistic mechanism for seeking recovery. *See Washington v. CSC Credit Services, Inc.*, 180 F.R.D. 309, 315 (E.D. La. 1998). In reality, the pursuit of these type claims can only be tried on a class basis.

The Court further notes that in the recently litigated case *Ting v. AT&T*, No. C 01-02969 BZ (N.D. Cal. Jan 15, 2002), which was certified as a class action against AT&T this year, the United States District Court judge specifically discussed this very issue and referenced this case finding that Mr. Allen's less than a $1.00 per month actual overcharge was too small to be litigated on anything other than a class action basis. This Court agrees. There are significant benefits to be derived from concentrating this action in this forum and there is no evidence that individual class members have any interest in individually controlling this litigation.

Accordingly, due to the relatively small amount of individual damages, the lack of individual issues, and the public policy behind consumer protection remedies, it is readily apparent that a class action is superior to other available methods for the fair and efficient adjudication of this matter.

*Variations in State Law*

As part of their burden in establishing that this case is proper for class certification, Plaintiff should evaluate the applicable law and determine that variations in state law do not make the case unmanageable. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). Plaintiffs contend and Defendant agrees that there are only 28 states which would have a taxing structure that would enable AT&T to overcharge as alleged in this lawsuit. Those states are: Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, and Wyoming.

The Defendants continually cite to potential problems created by the class definition as stated in the original Petition. However, Plaintiffs suggested alterations in the definition to conform to the evidence and proffered the definition stated above at the time of the class certification hearing. Changes in class definitions that narrow the scope of the Class are readily accepted in class action practice. *See Greghol Limited Partnership v. Oryx Energy Co.*, 959 P.2d 596, 598 (Okla. Ct. App. 1998). Plaintiffs' claims for restitution of money had and received and for breach of contract represent well established claims that do not differ substantially from state to state. Accordingly, the laws governing the claims advanced in this action are substantially similar and do not act to defeat either the predominance or the superiority requirements of § 2023(B)(3).

Here, Plaintiffs have surveyed the law of all 28 states with regard to each claim advanced and determined that these causes of action are similar in all relevant aspects. To the extent that there are limited variations in the law of the claims, such variations can be managed by subclassing and do

not warrant the denial of class certification. Although Defendant argues that there are variations in the tax laws which would defeat predominance, Defendants did not produce any such laws at the class certification once Plaintiffs met their burden of showing that the law of the claims advanced are substantially similar.

In any case, the Court is entitled to assume that the laws of the other states are the same as Oklahoma's unless the other states' laws are both clearly established and plainly contradictory to the law of Oklahoma. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731, 732 n.4 (1988); *Sollenbarger v. Mountain States Telephone and Telegraph Co.*, 121 F.R.D. 417 (D.N.M. 1988); *In re School Asbestos Litigation*, 789 F.2d 996, 1009-10 (3d Cir. 1986). It is Defendant's burden of proof to show that the laws of the other states are both clearly established and plainly contradictory to Oklahoma law. *Sun Oil Co.*, 486 U.S. at 731, 732 n.4 (defendants' contention that non-forum state law contradicted law applied by forum court rejected because defendant pointed to no decision which contradicted the law applied by the lower court); *Western Life Indem. Co. v. Rupp*, 235 U.S. 261, 275 (1914) ("If such a decision existed, it was incumbent upon defendant to prove it as a matter of fact."); *In re Telectronics Pacing Systems, Inc.*, 172 F.R.D. 271, 287 (S.D. Ohio 1997) (burden of the party seeking application of non-forum state law to clearly establish what that law is and that it is clearly contradictory to the forum law); *Sollenbarger*, 121 F.R.D. at 420 (burden of the party seeking application of non-forum state law to clearly establish what that law is and that it is clearly contradictory to the forum law); *In re School Asbestos Litig.*, 789 F.2d at 1009-10. Absent such a showing by Defendants, this Court is entitled to assume that the laws of the other states are the same as Oklahoma's and it therefore can apply Oklahoma law. *Sun Oil Co.*, 486 U.S. at 731, 732 n.4. Accordingly, the laws governing the causes of action advanced in this action are substantially similar and do not act to defeat

either the predominance or the superiority requirements of § 2023(B)(3).

For the foregoing reasons, Plaintiffs Motion for Class Certification is granted as follows:

1. This case is hereby certified as a class action pursuant to Okl.St.Ann. § 2023(B)(2) and (B)(3).

2. The Class is defined as:

   All AT&T customers, residing in one of the following states, that were charged money as a city or a municipal tax on long distance services made from their service location when they did not reside within the incorporated boundaries of that city or municipal taxing jurisdiction:

   Alaska, Arkansas, Arizona, California, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, West Virginia, Wyoming.

3. Plaintiffs, Bobby Gene Allen and Deborah Jane Allen, are hereby appointed Class representatives.

4. Janet R. Varnell, Brian W. Warwick, Harry G. Scoufos III and Robert Locke are appointed class counsel.

5. Plaintiffs are instructed to provide this Court with a proposed procedure for providing notice to the Class within 60 days from the date of this Order.

/s/ Mike Norma
DISTRICT COURT JUDGE

**APPENDIX D**

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

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Monday, September 29, 2003

---

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * * *

97,916 BOBBY GENE ALLEN ETC., V. AT&T CORPORATION.
Petition for certiorari is denied.
CONCUR: Watt, C.J., Opala, V.C.J., Hodges, Lavender, Summers, JJ.
DISSENT: Hargrave, Kauger, Boudreau, Winchester, JJ.

/s/ Joseph M. Watt
CHIEF JUSTICE

(2)

No. 03-1046

Supreme Court, U.S.
FILED
MAR 24 2004
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

AT&T CORP.,

*Petitioner*,

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Respondents*.

**On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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March 23, 2004

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## RESTATEMENT OF THE QUESTION PRESENTED

Whether a company who systematically overcharges its customers can evade judicial review by falsely labeling the overcharge a tax?

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IN THE

# Supreme Court of the United States

No. 03-1046

AT&T CORP.,

*Petitioner*,

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

## JURISDICTION

AT&T contends that this Court's jurisdiction is invoked under 28 U.S.C. § 1257 because "the federal issue - whether an Oklahoma court has the power to entertain claims arising out of the tax collection process in other states - has been finally decided . . .". However, because the claims asserted in this case do not challenge any state tax laws, no federal question was decided.

In addition, several other judicially promulgated rules demonstrate that it is inappropriate for this Court to grant certiorari review. First, the opinion is unpublished and has no precedential value. Further, the ruling is interlocutory in nature and does not constitute a final judgment. Finally, review at this stage will not serve the interests of judicial economy because a decision will not put an end to the litigation, and could only serve to impact a small number of

states while resulting in substantial costs and delays to the Class. Each of these points is addressed below.

AT&T attempts to overcome the non-final nature of the opinion below by arguing that the lower courts have "finally decided" that Oklahoma state courts have the power to entertain claims arising out of the tax collection process in other states. This is simply not true. Plaintiffs do not challenge any state tax statutes. Both the trial court and the Oklahoma Court of Civil Appeals found that this is not a suit for a "tax refund." After reviewing substantial evidence, including *ore tenus* testimony, the trial court decided a mixed question of fact and law holding:

> The amounts charged ***were not a "tax"*** simply because AT&T charged such amounts under the guise of a tax. Because this is ***not an action for a tax refund***, Plaintiffs were not required to pursue any administrative remedies before any tax commission prior to filing this action.

App. 47a-48a (emphasis added). Respecting the trial court's discretion, the Court of Civil Appeals examined the issue and found that this is not a tax refund action stating:

> Finally, AT&T asserts that the tax laws of each state reveal variations in the limitations period regarding tax refunds, rendering the claims of these Oklahoma residents atypical. We find the argument without merit because, as reasoned above, ***this is not an action to obtain a sales tax refund.***

App. 13a (emphasis added).

Accordingly, AT&T's argument that the Oklahoma courts decided they have the "power to entertain claims arising out of [the] tax collection process in other states" is simply incorrect. The facts of this case do not squarely present the issue stated by AT&T. It would not be prudent to utilize this case to decide the issue of whether a state court can adjudicate claims arising out of the tax laws of sister states

when the opinions below specifically found Plaintiffs' claims do not challenge the tax laws of any state. This Court should decide such a question only where a state court is attempting to hear a challenge to the tax laws of a sister state and true issues of state sovereignty are implicated. The alleged federal issue that AT&T depicts simply does not exist under the facts of this case.

Second, this opinion does not warrant discretionary certiorari review because it is an unpublished opinion from an intermediate state court with absolutely no precedential value beyond the case itself. Indeed, Oklahoma law expressly prevents this type of unpublished opinion from being cited as having any precedential value whatsoever. *See* Okla. Stat. Ann., tit. 20, § 30.5 (West 2003) (providing that "[n]o opinion of the Court of Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the Justices of the Supreme Court for publication in the official reporter . . . ."); *see also Russell v. Atlas Van Lines, Inc.*, 411 F. Supp. 111, 113 (D. C. Okla. 1976) (refusing to recognize pronouncements in unpublished Oklahoma Court of Civil Appeals decision because, as it had not been approved for publication by a majority of the justices of the Oklahoma Supreme Court, it had no precedential value). All of AT&T's arguments supporting this Court's accepting review are based on the assertion that doing so would resolve an alleged conflict. However, because the opinion below is unpublished, it cannot be "binding or cited as precedent." Okla. Stat. Ann., tit. 20, § 30.5. Therefore, all of AT&T's arguments must fail.

Third, this Court should not exercise jurisdiction pursuant to 28 U.S.C. § 1257 because the decision below is interlocutory. *See Black Hawk Oil Co. v. Exxon Corp.*, 969 P.2d 337, 343 (Okla. 1998) (stating that Oklahoma courts are prohibited from making any ruling on the merits prior to ruling on class certification). In fact, the trial court's order

granting class certification may be altered or amended before a decision on the merits. Okla. St. Ann. tit. 12, § 2023(c). As Justice Scalia has recognized, interlocutory appeals such as this are generally not good vehicles for deciding questions on certiorari. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J.) (noting that this Court will "generally await final judgment . . . before exercising [its] certiorari jurisdiction.").

This Court's reluctance to hear interlocutory appeals serves several important purposes. One is to emphasize the deference that appellate courts pay to the trial courts deciding the many questions of law and fact that occur in the course of a proceeding. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (stating that piecemeal appeals undermine the independence of trial courts). Here, the class certification determination was made after a full evidentiary hearing that included volumes of evidence and the testimony of multiple live witnesses after years of litigation. The trial court's decision was then reviewed by the Court of Civil Appeals and reviewed again on rehearing with both opinions affirming the certification. Thereafter, the Oklahoma Supreme Court denied AT&T's writ of certiorari after additional briefing. Thus, this Court should reject this interlocutory appeal in deference to the courts below.

Finally, AT&T contends that this Court should grant review to prevent "long and complex litigation," arguing that its jurisdictional argument brings this case within the exception that sometimes warrants review of interlocutory appeals. Petition at 3-4. This narrow exception, though, is logically employed in cases where jurisdiction resolves the question of where or whether the case will continue in litigation. *See, e.g., Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

Here, even if this Court were to accept jurisdiction and rule completely in AT&T's favor, this class action would continue. Notably, AT&T does not challenge the authority of the Oklahoma courts to resolve the claims of all Oklahoma class members (Petition at 5, n.2), and therefore regardless of any decision by this Court, the class action including the Okalahoma class members will go forward. Thus, the primary policy underlying the occasional review of interlocutory appeals based on jurisdiction is not present here. Therefore, this interlocutory appeal should be rejected because it will not serve the interests of judicial economy, but rather, would be inefficient, expensive, and would not end the litigation.

In sum, this Court should refrain from exercising jurisdiction because this appeal is of an intermediate state court opinion that does not involve a federal question, is unpublished and interlocutory. Finally, even if the Court accepted review and resolved the case wholly in AT&T's favor, it would not end the litigation. Certainly, the arguments raised by AT&T are not sufficient to warrant this Court's limited review under 28 U.S.C § 1257.

## INTRODUCTION

The central dispute in this case involves Petitioner AT&T Corp.'s ("AT&T") refusal to properly determine the actual location of its customers because, in its view, it is too expensive to do so. Respondents, Bobby Gene Allen and Deborah Jane Allen, on behalf of themselves and all others similarly situated ("Plaintiffs") seek to enjoin AT&T from improperly identifying customers within AT&T's billing system as living within city limits. The suit also seeks to force AT&T to stop improperly charging customers amounts designated as a city "tax" when AT&T knows it is improperly collecting these fees from customers residing outside the city limits. AT&T admits that customers residing outside the limits of the taxing jurisdiction should not be charged a fee

for city tax. However, AT&T fails to take reasonable steps to accurately categorize its customers, and as a result, millions of AT&T's customers are being improperly overcharged.

It should also be noted that Plaintiffs' claims do not impact any state's ability to collect taxes and do not challenge the validity of any tax law. Plaintiffs have not sued any taxing entity and seek no refund from any state treasury. Indeed, Plaintiffs' claims focus exclusively on AT&T's internal billing practices and procedures and stem from Plaintiffs' contractual relationship with AT&T. The true reason AT&T attempts to improperly couch this case as a "tax refund" case is to force each individual taxpayer to exhaust administrative remedies before various administrative bodies that do not provide for class actions - an obstacle that AT&T knows will effectively destroy any remedy for its customers.

## STATEMENT OF THE CASE AND FACTS

The opinion of the Oklahoma Court of Civil Appeals adequately sets forth the facts of this case. Petitioner's Appendix ("App.") 1a-17a. A more detailed description of the facts is set forth in the trial court's Order Granting Class Certification. App. 34a-58a. Plaintiffs will not replicate those discussions here. Nonetheless, several key facts that will aid this Court in its review are highlighted below.

AT&T has a billing system that categorizes each of its customer's addresses. It assigns each customer a "geo-code" or designation that determines which charges apply to the customer's service location. Part of this system involves an "Outside City Limits" or "OCL" indicator which tells AT&T's system whether the customer lives inside or outside the city limits. All customers with the OCL indicator marked "N" are supposed to reside inside the city limits. Conversely, if the OCL indicator is marked "Y" then the customer is categorized as living outside the city limits.

Whether a customer lives inside or outside the city limits is important for billing purposes because Oklahoma law requires municipal taxes to only be charged to those individuals who reside within the city limits of the municipal taxing jurisdiction. This basic tenant of taxation, of course, holds true in every state. When AT&T's system incorrectly categorizes a customer as residing within the city limits, a city tax is applied to long distance calls made by that customer. For example, a resident of Muskogee, Oklahoma is required to pay a 4.5% state sales tax and an additional 3.25% Muskogee city sales tax for a combined tax rate of 7.75%. By contrast, all AT&T customers who reside in the unincorporated area outside the city limits of Muskogee are only required to pay the Oklahoma state sales tax of 4.5% and are not legally obligated to pay the Muskogee city sales tax of 3.25%. Because AT&T's system fails to delineate individual taxes and simply lumps them together under the heading "local taxes," it is virtually impossible for a customer to realize when he or she is being overcharged.

This case involves millions of AT&T customers who AT&T has incorrectly categorized as living inside the city limits when, in fact, they live outside the city limits. AT&T admits that its system miscategorizes both business and residential customers in this manner. Because of the current complexity of AT&T's bills, it is nearly impossible for an average customer to know that the line item labeled "local tax" may include an overcharge.

## OPINIONS BELOW

Plaintiffs filed a class action complaint challenging AT&T's internal billing procedures. Plaintiffs contend that AT&T breached its contract with its customers by imposing improper charges against them. Plaintiffs also filed an equitable claim for restitution, as well as claims for injunctive and declaratory relief. Each of these claims focus exclusively on AT&T's internal billing practices and AT&T's contractual

obligations to its customers. Plaintiffs do not challenge any tax ordinance or tax collection practice. Plaintiffs do not seek a tax refund from any state treasury and have not sued any state taxing agency.

The trial court repeatedly rejected AT&T's attempt to portray this as a suit for tax refund:

> This Court previously rejected Defendant's characterization of this lawsuit as a claim for a tax refund in its rejection of AT&T's Motions to Dismiss. This is the law of the case. Defendant cannot change the character of Plaintiffs' case by defining the alleged overcharge as a tax. In this Court's view, the Defendant's arguments raised on the Motions to Dismiss . . . are untenable. The amounts charged were not a "tax" simply because AT&T charged such amounts under the guise of a tax. Because this is not an action for a tax refund, Plaintiffs were not required to pursue any administrative remedies before any tax commission prior to filing this action.

App. 47a-48a.

After determining that requirements of numerosity, commonality, typicality, and adequacy were satisfied, the court certified its first class pursuant to Okla. Stat. tit. 12, § 2023(B)(2) (2001). In doing so, the court determined that certification of the injunctive and declaratory relief claims was appropriate under Rule 2023(B)(2) because "[t]he primary relief sought by Plaintiffs is to force AT&T to correct the problem so that customers like the Allens will not be overcharged in the future." App. 51a.

In addition to the Rule 2023(B)(2) class, the trial court certified a second class pursuant to Rule 2023(B)(3). Despite AT&T's repeated attempts to couch this case as a suit for a "tax refund," the trial court correctly focused on AT&T's billing procedures:

> At the center of this case is AT&T's billing procedures. Regardless of minor variations in the factual circum-

> stances of absent class members, if AT&T's billing procedures are demonstrated to be flawed as they pertain to the Allens, then the class action mechanism will serve to adjudicate this issue for thousands of people.

App. 53a.

AT&T appealed the class certification to the Oklahoma Court of Civil Appeals. On appeal, AT&T's primary argument was similar to that raised here: trial courts are without jurisdiction to hear tax refund suits. Like the trial court, the Court of Civil Appeals disagreed with AT&T's characterization of the suit, finding that it "is not an action to obtain a sales tax refund." App. 13a. The court also determined that most AT&T customers would not even know they were being overcharged, and that those customers that did discover the overcharge "would not be able to prove individual claims before the OTC or other taxing authorities without access to AT&T records." As a result, the court found that the administrative remedies, even if applicable, "would likely present an insurmountable barrier to the individual customer seeking redress." App. 6a.

Thereafter, AT&T filed a Petition for Writ of Certiorari in the Oklahoma Supreme Court asserting that the Oklahoma courts did not have jurisdiction over the claims of class members residing outside the state of Oklahoma. The Oklahoma Supreme Court denied the Petition. AT&T now requests that this Court grant Certiorari review of the unpublished interlocutory opinion from the Oklahoma Court of Civil Appeals.

## SUMMARY OF THE ARGUMENT

In an attempt to entice this Court into accepting review, AT&T has misconstrued the facts of several cases it relies upon. Specifically, AT&T asserts that this Court should grant review because, it contends, the decision of the Oklahoma Court of Civil Appeals conflicts with opinions of the highest

courts in Arkansas and New York. However, the authority AT&T offers in support of its contention are misquoted and mischaracterized. First, AT&T cites *Ferguson v. Kroger Co.*, 37 S.W.3d 590 (Ark. 2001), for the proposition that "a state court is without jurisdiction to order other state treasuries to refund tax revenues." Petition at 12. Contrary to AT&T's representation, the Arkansas Supreme Court specifically stated that in light of its affirmance on another ground, it "*need not address* the trial court's findings that it lacked subject-matter jurisdiction to order other state treasuries to refund tax revenues . . . .". *Id.* (emphasis added). In any event, *Ferguson* is distinguishable from this case because Plaintiffs here are not seeking any funds from any state treasury.

AT&T also improperly cites *dicta* as the holding in *City of Philadelphia v. Cohen*, 184 N.E. 2d 167 (N.Y. 1962). AT&T fails to recognize that the discussion in *Cohen* referenced New York's position before the New York Legislature enacted a law directing New York courts "to recognize and enforce liabilities for taxes lawfully imposed by any other state or any political subdivision." *Id.* at 170.

Likewise, the opinion below does not conflict with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) because the law is consistent when the administrative remedy is futile to pursue. Moreover, the cases cited by AT&T are distinguishable from the case at bar because here, Plaintiffs are not seeking a "tax refund," do not challenge any tax laws, and focus exclusively on AT&T's billing procedures. In contrast, the plaintiffs in each case AT&T cites were either challenging a specific tax law or seeking a tax refund from state treasuries.

Finally, the decision below is consistent with a recent opinion from Illinois on virtually identical facts. The Illinois Court of Appeals in *P.J.'s Concrete Pumping Service, Inc. v.*

*Nextel West Corp.*, 803 N.E.2d 1020 (Ill. App. Ct. 2004) affirmed certification in a similar case where *Nextel* charged its customers local taxes based exclusively upon the customer's zip code. Like AT&T, *Nextel* argued that the Illinois court was without jurisdiction over the claims of class members residing outside Illinois. The Illinois Court of Appeals rejected this argument, reasoning that "plaintiff's claim is not about the tax ordinances of the local governments on whose behalf defendant collected the taxes [but instead] . . . is about defendant's billing practice of relying only on a customer's zip code to determine whether the customer owed a tax." *Id.* at 1031. The same distinction applies here because Plaintiffs' claims focus exclusively on AT&T's internal billing practices.

## REASONS FOR DENYING THE WRIT

### I. THE OKLAHOMA COURT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE SUPREME COURTS OR OF THIS COURT AND NO STATE'S SOVEREIGNTY IS CHALLENGED.

AT&T initially asserts that this Court should grant review because, it contends, the decision of the Oklahoma Court of Civil Appeals conflicts with opinions of the highest courts in Arkansas and New York. The two cases cited do not represent a true conflict because they are factually distinguishable and further, do not stand for the proposition argued by AT&T.

First, AT&T cites the Arkansas Supreme Court case of *Ferguson v. Kroger Co.*, 37 S.W.3d 590 (Ark. 2001) for the proposition that "a state court is without jurisdiction to order the treasuries of other states to refund tax revenues." Petition at 12. However, AT&T materially misquotes the *Ferguson* opinion. In *Ferguson*, plaintiffs filed a multi-state class action complaint related to Kroger's "double-coupon" adver-

tising campaign. *Id.* at 591. Although Kroger advertised that it would double the value of manufacturer's coupons on certain days, it discounted the value of the coupons by the amount of sales tax that was owed to the state. *Id.* at 591. The trial court denied class certification for a number of reasons including the fact that it believed it lacked jurisdiction to order the treasuries of other states to refund taxes. *Id.* at 592. On appeal, the Arkansas Supreme Court affirmed the denial of class certification because the plaintiff did not adequately define the class. *Id.* at 594. The court specifically declined to rule on jurisdiction.

> [W]e recognize that we are affirming the trial court for a different reason than what it specified in its order. . . . Because we are affirming on the basis of the Ferguson's failure to define the class sufficiently, we *need not address* the trial court's findings that it lacked subject-matter jurisdiction to order other state treasuries to refund tax revenues . . . .

*Id.* at 595 (emphasis added). Thus, the Oklahoma Court of Civil Appeals' decision does not conflict with the Arkansas Supreme Court's opinion in *Ferguson* because the Arkansas Supreme Court specifically declined to address the very issue AT&T erroneously claims is in conflict.

AT&T next argues that the decision of the Oklahoma Court of Civil Appeals conflicts with the New York decision, *City of Philadelphia v. Cohen*, 184 N.E. 2d 167 (N.Y. 1962). AT&T cites *Cohen* for the proposition that Oklahoma courts lack the authority to render any decision involving tax-related matters in another jurisdiction. Petition at 14. Again, AT&T's argument is decidedly at odds with the decision of the *Cohen* court. The issue before the court in *Cohen* was whether "the full faith and credit requirement of the Federal Constitution (art. IV, § 1) *requires* the courts of a State to entertain an action brought to enforce a defendant's alleged liability, not reduced to judgment, under the laws of another state?" *Id.* at 189 (emphasis added). In other words, the

court in *Cohen* was deciding whether it was *required* to take the case, rather than, as AT&T asserts, whether it had the *authority* to take the case. *Id.* (emphasis added). Philadelphia asked the New York court to entertain an action arising under Pennsylvania tax law against a former Pennsylvania resident who moved to New York while owing taxes to Philadelphia. *Id.* at 190. The New York high court decided it was not required to take the case because New York only provides such comity to foreign jurisdictions that reciprocate with New York. *Id.* at 192. The court would have entertained the case had it been filed by any one of 27 states that had agreed to provide New York with similar provisions. *Id.* Because Pennsylvania had not enacted a similar provision, New York declined to take the case. *Id.* Thus, *Cohen* does not hold that state courts lack the inherent authority to examine claims relating in any way to taxation in other states as AT&T argues. To the contrary, the New York court stated that it would have exercised its judgment had Pennsylvania provided it the same remedy. *Id.* at 192. Most importantly, *Cohen* is distinguishable from this case because here, no claim arising under the tax laws of any state is asserted. Because the facts of *Cohen* are so clearly distinguishable from this case, AT&T's argument that the two opinions conflict is meritless.

AT&T also cites a number of opinions from this Court involving constitutional challenges to state tax laws. Petition at 12-14. AT&T does not assert that these cases conflict with the opinion below. Instead, AT&T appears to cite these cases for the general proposition that state sovereignty prohibits courts of one state from adjudicating claims under the tax laws of another state. Petition at 13. This case does not challenge any state's tax laws but exclusively challenges AT&T's billing practices

In contrast, every one of these cases AT&T relies on involved a taxpayer challenging the validity of a state tax and the suit was brought against that state. *See e.g., National*

*Private Truck Council, Inc., v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995) (class action brought on behalf of nonresident motor carriers challenging constitutionality of retaliatory/third-tier taxes imposed on non-Oklahoma residents operating foreign-based motor carriers); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990) (wholesale liquor distributors challenging constitutionality of Florida excise tax which gave preferential treatment to beverages manufactured from Florida-grown citrus and other agricultural crops and then bottled in state). In principle, Plaintiffs agree that courts of the state imposing a tax should determine its validity. However, as explained more fully below, Plaintiffs here never challenged any tax law on any ground and only seek relief based upon their contractual relationship with AT&T. As a result, these cases are distinguishable and inapplicable.

AT&T's argument that the decision of the Oklahoma Court of Civil Appeals conflicts with the opinions of the highest courts in New York and Arkansas or with opinions from this Court is without merit because the cases cited by AT&T are distinguishable for the reasons stated above. Certiorari review is not warranted here because no conflict exists and because the facts of this case do not present the issue as depicted by AT&T.

## II. THE DECISION BELOW DOES NOT "THREATEN" STATE SOVEREIGNTY BECAUSE PLAINTIFFS ONLY SEEK REDRESS FOR AT&T'S IMPROPER BILLING PRACTICES, NOT A "TAX REFUND."

Both the trial court and the appellate court determined that this is not a tax refund case. AT&T argues that the decision below conflicts with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) because the trial court failed to examine how

administrative procedures for obtaining a tax refund vary from state to state. AT&T asserts that analyzing the administrative tax refund procedures of each state would demonstrate that certification is improper due to conflicts of state law. This argument is without merit because (1) the administrative remedies for obtaining a tax refund do not apply here because this is not a tax refund case; and (2) there is no material conflict between Oklahoma law and the law of the four jurisdictions cited by AT&T.

### A. Variation in administrative remedies for tax refunds among states does not create a conflict with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) because this is not a tax refund case.

Although AT&T couches its argument as a conflict with *Shutts*, in reality, AT&T asks this Court to overturn the trial court's finding that this is not a tax refund case. AT&T argued to the trial court that this was a tax refund case requiring application of exclusive administrative remedies. Plaintiffs responded that they were not seeking a tax refund, but rather, they sought to remedy the reoccurring problems within AT&T's billing system that resulted in millions of overcharges. After reviewing AT&T's two motions to dismiss and briefs on class certification; after hearing oral testimony of witnesses; after examining voluminous documents; and after hearing argument of counsel at the certification proceeding, the trial court determined a mixed question of law and fact that this was not an action for a tax refund. The trial court addressed this point directly in its order on class certification:

> This Court previously rejected Defendant's characterization of this lawsuit as a claim for a tax refund in its rejection of AT&T's Motion to Dismiss. . . . Defendant cannot change the character of Plaintiffs' case by defining the alleged overcharge as a tax. . . . Because this action is not an action for a tax refund, Plaintiffs

> were not required to pursue any administrative remedies before any tax commission prior to filing this action.

App. 47a-48a.

The Oklahoma Court of Civil Appeals was likewise not persuaded by AT&T's depiction of the facts, and plainly stated in its opinion that "[t]his is not an action to obtain a state sales tax refund." App. 13a. Thus, the trial court and the Court of Appeals determined that Plaintiffs are not seeking a tax refund. AT&T improperly asks this Court to replace its judgment for that of the lower courts' and determine otherwise. Absent this Court's willingness to do so, the application of administrative remedies for tax refund actions does not apply. Because the laws alleged to be in conflict are inapplicable, AT&T's alleged conflict is a distinction without a difference.

In a recent factually analogous case, another defendant telecom company attempted to characterize similar claims as a tax refund action. In *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 803 N.E.2d 1020 (Ill.App.Ct., 2004), the Illinois Court of Appeals squarely rejected that characterization. Like AT&T, *Nextel* incorrectly categorized thousands of customers within its internal billing system. *Id.* at 1020. Consequently, those customers were overcharged under the guise of a city tax that could never have been properly charged to them because they did not reside within the city limits. *Id.* The trial court certified a 17 state class. On appeal, *Nextel* raised the same "tax refund" argument AT&T advances here. *Id.* The Illinois Court of Appeals rejected this argument:

> Defendant argues that a class action is inappropriate here because the Illinois courts do not have the power to regulate the tax collection procedures in jurisdictions outside Illinois. As we stated earlier, however, plaintiff's claim is not about the tax ordinances of the local governments on whose behalf defendant collected the

> taxes. Instead, this claim is about defendant's billing practice of relying only on a customer's zip code to determine whether the customer owed a tax.

*Id.* at 1031.

The distinction the Illinois Court of Appeals found in *Nextel* is present here. Plaintiffs' claims are "not about the tax ordinances of the local governments on whose behalf defendant collected the taxes." *Id.* At a minimum, the *Nextel* decision shows uniformity between the states of Oklahoma and Illinois under factually identical circumstances.

### B. There is no material conflict between the law of Oklahoma and the laws of the other states referenced by AT&T.

#### 1. *There is no material conflict because the administrative remedy is futile, inefficient, or cannot grant the relief requested.*

In *Shutts*, this Court explained that the law of the forum state can be applied to claims arising in other jurisdictions if the law of the forum state does not materially conflict with the law of any other jurisdiction connected to the suit. 472 U.S. at 797, 823. Because no conflict exists, it was proper for the court to apply Oklahoma law.

AT&T argues that Pennsylvania, Texas, New York, and Florida give exclusive jurisdiction over tax refund claims to administrative bodies and that the decisions of the Oklahoma courts conflict with the substantive and procedural law in those states. However, none of these four states' laws actually conflict because, like Oklahoma, none of those states require futile administrative remedies to be exhausted.

The laws of Pennsylvania, Texas, New York, and Florida are wholly consistent with Oklahoma law regarding exceptions to the exhaustion of administrative remedies doctrine. Oklahoma law states that "administrative remedies need not

be exhausted if they would be ineffective, unavailable, or futile to pursue." App. 6a (citing *Waste Connections, Inc. v. Oklahoma Dept. of Environmental Quality*, 61 P.3d 219, 221 (Okla. 2002)). The Supreme Court of Pennsylvania recognizes that "exhaustion will not be required when the administrative process is not capable of providing the relief sought." *Ohio Cas. Group of Ins. Cos. v. Argonaut Ins. Co.*, 525 A.2d 1195, 1197-98 (Pa. 1987). Texas courts also recognize that administrative requirements need not be exhausted if their strict application would produce "an exercise in futility." *Sharp v. International Bus. Machs. Corp.*, 927 S.W.2d 790, 795 (Tex. App. 1996). New York follows suit by holding that administrative procedures need not be followed when "an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile, or when its pursuit would cause irreparable injury." *Watergate II Apartments v. Buffalo Sewer Auth.*, 385 N.E.2d 560, 563 (N.Y. 1978) (citations omitted). Finally, in Florida, one "is not required to pursue administrative remedies where such remedies would be of no avail." *Southern Bell Tel. & Tel. Co. v. Mobile America Corp., Inc.*, 291 So. 2d 199, 201 (Fla. 1974).

Under *Shutts*, the law of the forum state can be applied to claims of foreign class members as long as the law of the forum state does not conflict with the laws of other jurisdictions. *Id.* at 817. Here, there is no conflict between the law of Oklahoma and the law of the preceding states when, as here, the administrative remedies are inadequate. The Court of Civil Appeals noted: (1) that most of AT&T's customers would not even know they had been wrongfully charged; (2) that customers would not be able to prove individual claims before "any taxing authority" without access to AT&T records; and (3) that the administrative procedures "would likely present an insurmountable barrier to the individual customer seeking redress." App. 6a. Thus,

exhaustion of administrative remedies was not required under the facts of this case. The court went on to highlight another pivotal reason compelling this result:

> Our preceding analysis leads us to conclude that the administrative remedy is effectively unavailable to these Plaintiffs as well as to the myriad of other potential plaintiffs. But an even more important reason for finding that the Trial Court had jurisdiction is that a primary purpose of Plaintiffs' cause is to obtain injunctive relief, as authorized under 12 O.S. 2001 § 2023(B)(2), to prevent AT&T from continuing to use practices that have resulted in considerable overpayment by customers. The administrative remedy would do nothing to prevent AT&T from continuing to use procedures which resulted in overcharge of its customers and, thus, is insufficient as a remedy.

App. 6a-7a.

As discussed above, futile administrative remedies need not be exhausted in Pennsylvania, Texas, New York, or Florida, just as in Oklahoma. Because there is no conflict between the laws of the forum state, Oklahoma, and those four states, the opinion below does not conflict with *Shutts*.

### 2. *There is no* Shutts *conflict because the cases cited by AT&T do not involve injunctive and declaratory challenges to billing practices in an on-going contractual relationship.*

For AT&T to demonstrate a conflict as recognized in *Shutts,* it must demonstrate a conflict between the substantive law of the forum state and the law of other involved jurisdictions. In order for true "conflict" to exist, the claims advanced in the cases proffered to demonstrate that conflict must be the same. Here, the cases cited by AT&T challenge the validity of tax laws, assert claims directly against the respective state, and/or seek refunds directly from state

treasuries. By contrast, Plaintiffs here do not challenge the validity of a single tax law, do not sue any state taxing authority, and do not seek funds from any state treasury. Indeed, Plaintiffs' claims stem exclusively from their contractual relationship with AT&T and the manner in which AT&T operates its internal proprietary billing system.

AT&T cites cases from Florida and New York where the plaintiffs actually filed suit against the state and were seeking tax refunds directly from the state treasuries for taxes they asserted were unlawful. These critical facts make those cases obviously distinguishable from the case at bar. In *P.R. Marketing Group, Inc. v. GTE Florida, Inc.*, 747 So. 2d 962 (Fla. Dist. Ct. App. 1999), the named plaintiff sued the Florida Department of Revenue seeking tax refunds directly from the state treasury, and also sued all Florida local and long distance telephone companies in a defendant class. Plaintiff in *GTE* challenged the "bracket method" of calculating sales tax on long distance telephone calls. *Id.* Because nothing beyond AT&T's contractual obligations and the declaratory and injunctive relief relating to its billing systems are at issue in this case, *GTE* is distinguishable and does not represent a conflict worthy of review.

Likewise, *Davidson v. Rochester Telephone Corp.*, 558 N.Y.S.2d 1009, 1010 (N.Y. App. Div. 1990), is distinguishable from this case because the *Davidson* plaintiffs also sued the state. There, plaintiffs sought tax refunds directly from the New York state treasury and challenged the validity of taxes associated with telephone charges. *Id.* at 1010. Importantly, the *Davidson* plaintiffs did not assert that the phone company's conduct was wrongful in any way. The appellate court found that the collecting company could not be liable where the plaintiffs were challenging the validity of an actual tax that the company had no right to question. *Id.* at 1011. In contrast, Plaintiffs here do not challenge the validity of any tax law. Plaintiffs merely challenge AT&T's internal

billing procedures. They also seek to enjoin AT&T from continuing to improperly classify its customers and overcharge them under the guise of a tax. As a result, contrary to AT&T's assertion, the opinion below does not conflict with *Davidson*.

AT&T also relies on *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex.App.-San Antonio, 1999), in which three grocery stores in a chain inadvertently set the amount of sales tax to be charged to customers at an amount exceeding the legal sales tax rate. *Id.* at 332. Once the error was found, the stores immediately corrected their systems so that no customers would be overcharged in the future. *Id.* The sole issue before the court in *Serna* was the refund of taxes that had been erroneously collected and turned over to the state. *Id.* at 335. The Texas Court of Appeals, San Antonio, held that the taxpayer's sole remedy for receiving such a refund was the administrative remedies available under the Texas Tax Code. *Id.*

The *Serna* decision is distinguishable from this case on two grounds. First, the *Serna* defendant corrected the improper charges and no further improper charges were being incurred. *Id.* at 334. Thus, there was no continuing overcharge to challenge and no injunctive relief sought. Second, the *Serna* parties lacked an ongoing contractual relationship in which the plaintiffs were seeking relief. Here, Plaintiffs and the remaining class members have an ongoing contractual relationship with AT&T, and the erroneous charges can only be corrected by changing AT&T's proprietary billing system. As a result, no true conflict exists between *Serna* and the opinion below because they are distinguishable in important ways.

In addition, a more recent decision of the Texarkana division of the Texas Court of Appeals, *Alford Chevrolet-Geo v. Jones*, 91 S.W.3d 396 (Tex.App.-Texarcana, 2002), supports the decision at issue here. In *Jones,* plaintiffs filed a

class action suit against 600 auto dealerships alleging that the dealerships had improperly charged over one million customers for a tax they did not owe. *Id.* at 399. Rather than requiring plaintiffs to seek a refund from the state as in *Serna*, the Texas Court of Appeals in *Jones* affirmed the trial court's class certification order on the following facts:

> In every case in this class action, the buyer was confronted with an inaccurately described line-item tax that was usually sandwiched in among legitimate taxes payable to the state by the buyer. . . . The allegations are that consumers paid a tax they did not owe because they were billed for the tax by the Dealers.

*Id.* at 404-05.

*Jones* is more analogous to this case than *Serna* because like the plaintiffs in *Jones*, Plaintiffs here also challenge the manner in which a business represented local taxes to its customers. Instead of separating charges related to each taxing jurisdiction, AT&T's procedure is to lump together all local taxes so that it becomes virtually impossible for customers to determine whether they are being correctly charged. Indeed, Plaintiffs seek injunctive relief which would require AT&T to delineate each tax individually on its bills so that customers can confirm the accuracy of the charges being applied. Because the decision of the Oklahoma Court of Appeals below follows the more analogous opinion in *Jones*, it cannot be said to conflict with Texas law. At most, *Jones* represents an alternative rationale under Texas law. Simply because the Oklahoma decision below follows the *Jones* rationale over *Serna* does not present an issue worthy of this Court's review.

Finally, AT&T argues that the decision of the Oklahoma Court of Appeals conflicts with the Pennsylvania decision in *Heaven v. Rite Aid Corp.*, 2000 WL 33711049 (Pa. Com. Pl., 2000). However, the Pennsylvania decision is not binding authority on any court and further, is not even permitted to be

cited in a party's brief. *See* Pa. R. Cmmw. Ct. I.O.P. § 414 (2003); Pa. R. Super. Ct. I.O.P. 65.37(A) (2003); *Commonwealth v. Karn*, 650 A.2d 1176 (Pa. Cmwlth. App. 1994) (stating that citation to unreported opinion violated court's internal operating procedures and thus case was not considered by court in reaching decision on appeal); *see also* Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473 (Fall 2003). *Heaven* is an unpublished trial court opinion without precedential value beyond the case itself. Accordingly, AT&T's argument that the Oklahoma Court's opinion conflicts with *Heaven* in no way warrants review by this Court.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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IN THE

# Supreme Court of the United States

AT&T CORP.,

*Petitioner,*

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN,
ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals**

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## REPLY BRIEF

As AT&T explained in its opening brief, the class certification order that the Oklahoma Supreme Court approved in this case violates fundamental principles of state sovereignty and due process. By permitting Oklahoma state courts to exercise jurisdiction over, and apply Oklahoma law to, claims challenging the collection of municipal sales taxes in 27 other States, the decision below interferes with the core sovereign authority of these other States to administer their own tax laws. Indeed, the Multistate Tax Commission, which represents 23 of the affected States *as well as Oklahoma itself*, has filed an amicus brief urging this Court to review the "perverse" decision of the Oklahoma courts, which "impairs . . . legitimate State tax policies" and "directly den[ies] the sovereign interests of sister States." Multistate Tax Commission Br. ("MTC Br.") 2.

The Oklahoma courts' conclusion that it can treat this case as one that does not involve tax refunds does not obviate the constitutional violation; that conclusion *causes* the violation. As the Multistate Tax Commission has confirmed, whatever the rule in Oklahoma, in other States this lawsuit—an action against an involuntary agent who allegedly over-collects taxes that it remits to the State—would be defined as a tax refund action. Some States bar this type of suit altogether, while others require that such a suit be brought only after administrative remedies are exhausted, or only in certain courts. The class certification order entered in this case unconstitutionally interferes with the judgments of these other States, and no effort to distinguish cases on their specific facts can obscure this fundamental violation of state sovereignty.

Nor is there any merit to respondents' finality argument. This case falls within a well-recognized exception to the final judgment rule. In fact, the finality rule is rooted in principles of federalism and respect for the sovereign rights of States—

the very same principles Oklahoma's courts violated in this case. Respect for one State's judicial processes should not shield from review a decision that intereferes with the processes and legislative judgments of 27 other States.

1. This case squarely presents the federal issue of whether a state court can entertain a suit by non-residents challenging an alleged over-collection of local taxes, when the States in which those plaintiffs reside prohibit such suits. Contrary to respondents' central claim, the Oklahoma courts necessarily—and incorrectly—resolved this legal issue. Whether this suit is a prohibited tax refund action is not "a mixed question of fact and law" to be resolved on the basis of testimony. Opp. 2. It is a legal determination that must be made under the laws and policies of each State in which particular taxpaying class members reside. And several of the States in which class members reside have concluded that this precise type of lawsuit *is* an improper tax refund action.

Indeed, the Oklahoma Court of Civil Appeals itself expressly recognized that other States treat lawsuits against vendors for alleged over-collection of taxes as tax refund actions. Pet. App. 4a-5a (citing *P.R. Mktg. Group* v. *GTE, Fla., Inc.*, 747 So. 2d 962 (Fla. Dist. Ct. App. 1999), and *Serna* v. *H.E. Butt Grocery Co.*, 21 S.W.3d 330 (Tex. App. 2000)). In *Serna*, the Texas court concluded that, under Texas law, any suit "claiming [that] taxes were collected in an amount greater than the legal rate[] *actually amounts to a suit for a tax refund*." 21 S.W.3d at 335 (emphasis added). Like respondents here, the plaintiff in *Serna* argued that a suit seeking "damages" from a vendor for the allegedly unlawful collection of excess sales taxes was not a suit for "a refund of a sales tax," *id.* at 332, but the court squarely rejected that claim. "[P]ermitting a party to cloak a suit under a different cause of action, in order to seek redress from the agent who collects the tax (and who no longer holds the funds in question)" would impermissibly thwart Texas statutes

designed to protect vendors and promote "the fair and efficient administration of the Texas sales tax." *Id.* at 334-35.

Similarly, in *P.R. Marketing Group*, the Florida court concluded that, under binding state precedent, customers could not sue either the vendor who "collected more sales tax than the law allows" or the state agency that received those excess taxes without exhausting certain administrative remedies. 747 So. 2d at 962, 964. In *Davidson* v. *Rochester Tel. Corp.*, 558 N.Y.S.2d 1009 (App. Div. 1990), the New York court held that plaintiffs could not bring an "unjust enrichment" claim against a telephone company for overcollection of sales taxes; the taxpayers' sole recourse was to sue the State for a refund, after exhausting administrative remedies. *Id.* at 1011. And a Pennsylvania court concluded that Pennsylvania's tax code precluded a fraud action based on over-collection of taxes. *Heaven* v. *Rite Aid Corp.*, No. 0596, 2000 WL 33711049, at *5 (Pa. Ct. Com. Pl. Oct. 27, 2000).[1]

These cases make clear that, unlike Oklahoma, other States would regard this lawsuit as a tax refund action. More fundamentally, these cases demonstrate that the Texas, Florida and New York residents who are members of the class in this case are, by virtue of the certification order, bringing direct actions against AT&T for over-collection of local taxes that their home States *do not allow those residents to bring.* That order is thus a direct affront to the sovereign rights and interests of these States.

None of the factual distinctions respondents offer can obscure or minimize the impropriety of that affront.

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[1] Although respondents object to citation of this decision, Op. 22-23, AT&T does not rely on the case for its precedential value, but as evidence that Pennsylvania's tax laws have been applied in the same manner as the tax laws of other States. Indeed, the Multistate Tax Commission, which represents Pennsylvania, has confirmed that Pennsylvania requires claims implicating taxes to be brought against the State itself. MTC Br. 6.

Respondents make much of the fact that the plaintiffs in *P.R. Marketing Group* sued the state taxing authority and sought refunds directly from the state treasury. Opp. 20. But the plaintiffs in that case also sued the vendor, and the court held that they could not proceed with *any* of their claims because they had not exhausted administrative remedies.

Respondents' suggestion that *Davidson* is distinguishable because the plaintiff in that case "sought tax refunds directly from the" State, Opp. 20, is wrong. Davidson "ma[de] no claim against the State." *Davidson*, 558 N.Y.S.2d at 1011. Respondents' assertion that Davidson "did not assert that the phone company's conduct was wrongful," Opp. 20, is also incorrect. Like respondents here, Davidson alleged that the "collection of sales taxes was 'improper, unnecessary, unauthorized by law, and . . . an unjust enrichment.'" *Davidson*, 558 N.Y.S.2d at 1011 (omission in original). And, like respondents here, Davidson did not challenge the "validity" of the tax but its applicability, arguing that the specific service (like the specific non-municipal residents here) was not subject to the tax in question. *Id.*

Nor can respondents distinguish the decision in *Serna*, which held that Texas citizens cannot sue vendors at all for over-collection of taxes. Neither *Serna* nor the statutes cited in that case recognize any exception for citizens who have "ongoing contractual relationship[s]" with vendors or who seek injunctive relief in addition to damages. Op. 21. Respondents' suggestion, *id.* at 21-22, that *Serna* was modified by *Alford Chevrolet-Geo* v. *Jones*, 91 S.W.3d 396 (Tex. App. 2002), is utterly baseless. The vendors in *Jones* defrauded consumers into paying taxes that the *vendors* owed. In stark contrast to *Serna*, *P.R. Marketing Group*, *Davidson* and this case, therefore, the State did not receive any of the contested payments; the windfall went to the vendors, who had larger after-tax profits than they would have enjoyed had they paid their obligations to the State with their own funds instead of money they bilked from customers. In allowing the

victims of this fraud to sue, *Jones* did not alter the rule that vendors cannot be sued for *collecting and remitting* taxes in an allegedly erroneous amount.

As the Multistate Tax Commission has explained, Texas, Florida, New York and other States whose residents were certified as part of the class prohibit suits like this or require exhaustion in order "to enhance the efficient functioning of state tax systems." MTC Br. 2. These rules promote "willing cooperation from those responsible to collect and pay over" taxes, "safeguard [the States'] fisc," "protect[] the court system from needless litigation," and ensure that tax disputes are resolved by those who are "familiar with the intricacies of tax laws." *Id.* at 2, 6. While Oklahoma is free to decide that these policies should not bar a suit by its citizens for over-collection of state or local taxes, it cannot make that decision for any other State. Yet that is precisely what it has done here.

Indeed, in concluding that the trial court had jurisdiction to certify a multi-state class, the Court of Civil Appeals stressed that the primary purpose of respondents' suit was to obtain injunctive relief, Pet. App. 7a; see also Op. 19-22. As the policies behind the federal Tax Injunction Act, 28 U.S.C. § 1341, attest, however, such relief is the most severe interference with "'the imperative need of a State to administer its own fiscal operations.'" *Franchise Tax Bd.* v. *Alcan Aluminium Ltd.*, 493 U.S. 331, 338 (1990). Respondents try to brush aside this violation of state sovereignty by blithely asserting that no State permits imposition of municipal taxes on those who reside outside the municipality. Op. 7. But error-free tax collection is simply not possible in light of the enormous complexity and expense of the activity. See Council on State Taxation ("COST") Br. 6-8. Accordingly, the class certification order in this case creates strong incentives for businesses to under-collect taxes in order to avoid damages liability, see *id.* at 8-9—the very incentives States like Texas, Florida, New York and others

seek to prevent by, among other things, barring direct suits against vendors for over-collection of taxes.[2]

Similarly, while Oklahoma is free to decide for itself that administrative remedies need not be exhausted in a case such as this, other States have made a contrary determination. In *P.R. Marketing Group* and *Davidson*, the courts weighed the very same practical burdens and problems that the court below identified, but concluded that exhaustion was still required. See *P.R. Mktg. Group*, 747 So. 2d at 964-65; *Davidson*, 558 N.Y.S.2d at 1012 (Yesawich, J., dissenting) (identifying problems). By certifying a class that includes Florida and New York residents, the Oklahoma courts have directly impaired the sovereign rights of other States to manage their own fiscal operations.

In short, the certification order in this case squarely raises a fundamental federal question concerning the duty of one State to respect the sovereign taxing prerogatives of sister States. And Oklahoma's determination that it can adjudicate claims challenging a vendor's alleged over-collection of taxes in other States conflicts with the decision of the highest court of New York, which has recognized that "[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State." *City of Phila.* v. *Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962). Once again missing the doctrinal forest for the factual leaves, respondents argue that *Cohen* only addressed whether New York courts were *required* to hear a tax suit brought by another State. Op. 12-13. But *Cohen* deemed it an "intrusion" to hear claims involving another State's taxes even when the other State *wanted* New York to do so. It follows *a fortiori* that New

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[2] These incentives, moreover, completely belie respondents' simplistic claim that the order in this case will "not impact any state's ability to collect taxes." Op. 6.

York would not entertain a suit challenging the collection of taxes in other States when those States *prohibit* such suits.

Even without this conflict, however, this case warrants review. This Court recently granted certiorari in the absence of any split in authority in order to review an isolated decision that merely chilled California's ability to conduct residency audits as part of its tax enforcement efforts. See Petition for Writ of Certiorari, *Franchise Tax Bd.* v. *Hyatt*, No. 02-42 (U.S. filed July 2, 2002) ("California Petition").[3] The decision in this case is not an isolated problem; an Illinois court recently upheld a multi-state class certification order that violates the sovereignty of other States in precisely the same manner as the order in this case. *P.J.'s Concrete Pumping Serv., Inc.* v. *Nextel W. Corp.*, 803 N.E.2d 1020 (Ill. App. Ct. 2004). Moreover, the orders in this case and in *Nextel* have far greater and more immediate adverse impacts on the sovereign right of States "'to administer [their] own fiscal operations,'" *Alcan Aluminium*, 493 U.S. at 338, than was true in *Hyatt*. These orders do not merely chill ancillary enforcement efforts, they permit over-collection suits that other States bar, and create perverse incentives for the under-collection of taxes. The decision in this case plainly warrants review in this Court, the only Court that can prevent these fundamental harms to the sovereign interests of other States.

2. Respondents' attempt to show that the decision in this case is consistent with the due process requirements set forth in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-12 (1985), fails for essentially the same reasons. Respondents rely on the same boot-strapping premise that this case is not a tax refund action. Opp. 15-17. Not only is this contention wrong, see *supra* 2-3, it is irrelevant. Due process prohibits Oklahoma from applying its substantive law to claims

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[3] California's petition cited only two lower court state decisions involving cooperative federalism principles in two non-tax cases. *See* California Petition at 12-14.

involving taxes, taxpayers and transactions entirely beyond its borders, regardless of the nature of those claims.

Nor is it true that there is no "material conflict" between Oklahoma's law and that of the 27 other affected States. Op. 17-19. Texas, New York and Florida may all recognize a general "futility" exception to their administrative exhaustion requirements. But both Texas and New York flatly prohibit direct actions against vendors for over-collection of taxes, whether or not administrative remedies are exhausted. See *supra* at 2-3. And Florida has squarely held that its exhaustion requirement applies in precisely the circumstances presented here. *Id.* at 3. Finally, the fact that respondents seek injunctive relief does not obviate the constitutional infirmity of the class certification order. Op. 19-22. Enjoining the collection of taxes in other States based on the extraterritorial application of Oklahoma law directly interferes with the sovereign rights and prerogatives of those States.

3. Unable to defend the constitutional propriety of the order in this case, respondents seek to shield it from review. They stress that the decision of the Court of Civil Appeals is unpublished and thus is not binding precedent. Op. 1, 3, 5. But this Court has not permitted publication status to insulate intermediate state court decisions from review where, as here, those decisions clearly violate federal law. See, *e.g.*, *Perry* v. *Thomas*, 482 U.S. 483, 488-89 (1987) (reviewing and reversing unpublished, interlocutory decision in which intermediate state court refused to compel arbitration in accordance with federal law); see also *Smith* v. *United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, O'Connor and Souter, JJ., dissenting) ("Nonpublication must not be a convenient means to prevent review"). Whether or not the decision of the Court of Civil Appeals must be followed by other Oklahoma courts in the future, that decision necessarily harms the sovereign rights of other States.

Nor does the interlocutory nature of the decision preclude review. The Oklahoma Supreme Court has decided, by a 5-4

vote, that Oklahoma courts can entertain over-collection suits brought by non-resident taxpayers whose own States prohibit those very claims. This Court has repeatedly reviewed interlocutory state court decisions in cases, such as this one, where the federal issue is whether state courts have the power to entertain certain claims at all. See Pet. 3 (describing cases); see also *Perry*, 482 U.S. at 488-89. In this case, moreover, "a refusal immediately to review the state court decision" will not just "seriously erode federal policy." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 483 (1975). Where, as here, non-residents are barred from suing vendors for alleged over-collection of taxes, the very act of permitting such suits violates the sovereign rights of other States and the principles of cooperative federalism that underlie our system of government. Where interlocutory decisions cause immediate harms to important federal interests, this Court does not postpone review while the merits are improperly addressed. See, *e.g.*, *Perry*, 482 U.S. at 488-89; *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 546-50 (1963).

Indeed, there is a very real danger that the interests of affected States will never be vindicated if review is denied now. Large class actions create enormous pressures for defendants to settle rather than risk massive damages awards. AT&T has neither all of the incentives nor all of the resources that a State would have to litigate this case to a final judgment. Yet the States will be directly harmed by a settlement, which will create strong incentives for other vendors to resolve all good faith doubts in favor of under-collection, given the comparative risks of under-collection versus over-collection of state taxes. See COST Br. 8-9.[4]

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[4] By contrast, there is little chance that non-residents will ever be excluded from the class. While certification orders can be amended, the question of including non-residents in the class has been decided as one of jurisdiction, not one of class definition. Indeed, the trial court has "repeatedly rejected" AT&T's jurisdictional argument, Op. 8, insisting

It would be particularly inappropriate for this Court to countenance such impairments of the sovereign interests of numerous States based on the finality requirement of 28 U.S.C. § 1257. The final judgment rule itself is rooted in principles of federalism that compel respect for the sovereign rights of States. But these very principles have been violated by Oklahoma's approval of the class certification order in this case. A statute designed to ensure federal court respect for state judicial processes should not shield from review a state-court decision that intereferes with the judicial processes and sovereign legislative judgments of 27 other States. Because the final judgment rule does not stand as a barrier to this Court's review of interlocutory state-court decisions that violate federal arbitration and venue policies, see *Perry*, 482 U.S. at 488-89; *Southland Corp.*, 465 U.S. at 6-8; *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963), it cannot preclude review of an interlocutory decision that "impairs . . . legitimate State tax policies" and "directly den[ies] the sovereign interests of sister States." MTC Br. 2.

Finally, immediate review will not result in any inefficiency or undue expense. Op. 5. While such review will not terminate litigation by Oklahoma taxpayers, it will end litigation on causes of action that non-residents have no right to bring and that Oklahoma courts cannot entertain, and thus will significantly simplify the litigation and eliminate the need for further proceedings following this Court's review of a final judgment. In all events, considerations of judicial economy must yield where, as here, an interlocutory decision creates an intolerable risk of interference with the core sovereign rights of other States.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

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that it is "law of the case." Pet. App. 47a. Respondents do not suggest how the issue could even arise again in any subsequent proceedings.

Respectfully submitted,

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No. 03-1046

IN THE

# Supreme Court of the United States

AT&T CORPORATION,

*Petitioner*,

v.

BOBBY GENE ALLEN AND DEBORAH JANE ALLEN, on behalf of themselves and all others similarly situated,

*Respondents*.

**On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF COUNCIL ON STATE TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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**On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals**

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Council On State Taxation ("COST") respectfully requests leave to file a Brief as Amicus Curiae in support of Petitioner. The interest of COST as *amicus curiae* is described infra at Brief, pp.__. Counsel for Petitioner has consented to COST's filing of an *amicus* brief. Despite COST's qualifications to submit an *amicus* brief, Counsel for Respondent has refused to consent to the filing of such a brief. However, in the absence of such permission there are at least two reasons for granting this request.

First, with respect to the Petition filed in this case, COST has additional observations to make concerning the proper interplay between the scope of class-action certification and the proper functioning of state and local tax systems. In particular, COST will articulate the constitutional and practical implications raised by certification of a nationwide class-action when certification of the class itself threatens the

proper functioning of state and local legal structures. A full exposition of the controversy of this case by interested and eligible amici is ultimately to the benefit of the Court in its administration of writs for certiorari.

Second, because AT&T is but one of nearly six-hundred COST members that are required to collect sales taxes on behalf of states and local governments, COST is uniquely qualified to comment on the impact the decision by the Oklahoma Court of Appeals will have on multistate businesses.

Respectfully submitted,

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## INTEREST OF THE *AMICUS CURIAE*

The Council On State Taxation (COST) submits this brief as *amicus curiae* in support of Petitioner in the above-captioned matter.[1]

COST is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. In that role COST monitors and works to improve the administrative obligations imposed on businesses by state and local revenue systems. COST represents nearly 600 corporations including companies from every industry segment.

The present case directly impacts the complexity and fairness of our country's system of raising revenue for state and local governments, thus COST seeks to express its view point regarding the case in furtherance of its mission. While the present litigation involves sales taxes collected by a telecommunications company, the decision has broader implications for any tax that vendors are obligated to collect. Use of nationwide class-action suits in the tax arena has begun to spread to other taxes and is taking place in numerous states.[2] Unchecked, such litigation threatens the

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consent of the Petitioner has been obtained and filed with the Clerk of the Court.

[2] *See P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, No. 2-02-1219, 2004 WL 171546 (Ill. App. Ct. Jan. 27, 2004) (the Illinois Court of Appeals certified a class-action spanning seventeen states for refunds of taxes collected by Nextel. Nextel based its determination of collection on zip code and incorrectly assessed tax on certain residents outside of incorporated city limits. The Court failed to appreciate that it was a refund of taxes and focused on a deceptive practice claim submitted by the plaintiff in certifying the class.); *Larrieu v. Wal-Mart Stores, Inc.*, No. 2003 CA 0600, 2004 WL 324962 (La. App. Feb. 23, 2004) (the court dismissed a class-action lawsuit against Wal-Mart for the overcollection of taxes on prepaid calling cards because the purchasers failed to pursue

orderly and effective administration of state and local revenue systems between government and business.

We understand that the Multistate Tax Commission (an association representing state tax administrators) is also filing a brief as *amicus curiae* in support of the Petitioner. Over the past thirty years the Multistate Tax Commission and COST have filed briefs in almost every significant state and local tax case before this Court. This case represents the first instance in those thirty years in which the two organizations will file in support of the same party, demonstrating the threat posed to both business and government by the decision below.

COST submits this brief to encourage the Court to provide necessary guidance in an area that affects all of its members. Specifically, COST hopes that the Court will articulate a standard for certification of nationwide class-action suits under *Phillips Petroleum Co. v. Shutts et al.*, 472 U.S. 797 (1985) when certification itself impinges on the proper functioning of state or local tax code provisions. Without the Court's guidance, businesses will be subject to an increasing number of shotgun-approach class-action suits that threaten the proper functioning of state and local revenue systems. Correspondingly, state and local governments will be forced to adjust the way they rely on businesses to act as their collection agents. By granting the Petition for Certiorari, this Court can clarify the interplay between the standards for certification of class-action suits and the proper functioning of state tax laws.

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the available administrative remedies, there was no cause of action against the vendors because they did not exceed their authority, and purchasers could not recover from the amounts the state allows Wal-Mart to retain under the theory that it was compensation.); *see also, Larrieu v. Terrebonne Parish Sales and Use Tax*, No. 2003 CA 0934, 2004 WL 326455 (La. App. Feb 23, 2004) (decided on the same day as *Wal-Mart* for the same reasons.)

## SUMMARY OF THE ARGUMENT

A foundation of tax law in this country is withholding taxes. State and local governments create an incentive for corporations to collect from customers and remit the collected amounts to the taxing authority by making the corporation liable for undercollection. The decision by the Oklahoma Court of Appeals creates an additional liability for over-collection payable to customers. Due to the complexity associated with the multiple tax jurisdictions and the changing tax boundaries, AT&T is unable to comply with the tax laws with absolute certainty given the current technology. Thus, AT&T is in the unenviable position of choosing between exposing itself to overcollection liability to customers or undercollection liability to state and local tax jurisdictions.

In evaluating the liability, AT&T and other similarly situated vendors must consider that exposure in the case of undercollection occurs only in the case of an audit by the taxing jurisdiction. Risking a potential audit is preferential to certain exposure for a class-action claim. Therefore, the decision below destroys the corporate incentive to collect and remit withholding taxes because of the possible liability for overcollection.

The plaintiffs are attempting to exploit AT&T's unenviable position by framing the issue as non-tax to justify a refund directly from AT&T rather than the taxing authority that currently has the money. The Court should reverse the decision below and require plaintiffs to seek refunds by following the administrative process in their state.

Beside the practical result of the decision, impacting vendor collection of taxes for state and local governments, the decision also violates state sovereignty in the administration of substantive state tax laws. The Oklahoma Court of Appeals completely ignored the substantive rules of twenty-seven other states included in the nationwide class action.

Oklahoma may certify a class for Oklahoma residents, even though it seems contrary to their own statutory policy, but Oklahoma cannot impose its decision on twenty-seven other states which have a right to administer their tax laws and policies as they see fit.

This Court enunciated this restriction in *Shutts*. The court below failed to even address the *Shutts* decision in applying its own substantive law across twenty-seven other states. Allowing the Oklahoma decision to stand impinges on the other twenty-seven states' ability to administer their specific tax codes. Many states, including ones certified in this class, do not allow direct action against vendors, but rather require the taxpayer to follow administrative procedures to obtain a refund. States realize that vendors do not want to collect taxes for them. If, as an incentive, a state wishes to protect a vendor from exposure to liability for being an agent of the state, then that is the state's prerogative because the overcollection occurs as a result of AT&T's attempt to comply with the applicable tax code. States, such as Oklahoma, must respect the decision of another state regarding the determination of how to administer its tax code among itself, its forced collection agents and its taxpayers. The Oklahoma decision must be reversed so as to respect the sovereignty of the other twenty-seven states.

The Streamlined Sales Tax Project is just one example of state interaction with corporations to solidify the collection relationship for which the decision below could interfere. While, the SSTP rules were only effective as of November of 2003 in Oklahoma, the clear meaning is that each state should decide what is appropriate in the interplay between the state, the vendor and the taxpayer regarding withholding taxes. Specifically, the SSTP provides explicit refund options for customers and hold harmless provisions to protect vendors. Individual states should be able to adopt the SSTP provisions without concern that a court in another state may interpose itself between the state and its collection agents. In the

decision below, the Oklahoma Court of Appeals improperly imposed its will on other states.

## ARGUMENT

**I. If the decision by the Oklahoma Court of Appeals is allowed to stand, AT&T and other similarly situated vendors will be forced to choose between the lesser of two evils—either liability for over-collection in a class action suit by customers or liability for undercollection from state or local governments as involuntary withholding agents—because given the current status of technology it is impossible for vendors to collect taxes from customers with absolute accuracy.**

This case involves the proper interplay between the scope of class–action certification and the proper functioning of state and local tax systems. As indicated in the Petition for Certiorari, two Oklahoma customers sued Petitioner in Oklahoma on behalf of Petitioner's customers located in Oklahoma and twenty-seven other states. The Oklahoma customers contended that Petitioner fraudulently collected sales tax from customers residing on the borders of municipal taxing jurisdictions in each of the twenty-eight states.[3] The Court below, by allowing the Oklahoma customers to sue on behalf of customers in other states, in disregard of the legal structure in those other states, threatens the stability and certainty of state and local revenue administration nationwide.

The first key to comprehending the repercussions of this case on state and local revenue systems is an examination of the overall state and local tax structure and the nature of Petitioner's role in collecting sales tax for state and local

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[3] AT&T does not challenge the certification of the class for Oklahoma, only with respect to the other twenty-seven states.

governments. A multitude of different statutes varying from state-to-state within the scope of the class-action require the Petitioner to correctly calculate, collect, and remit sales tax to each of the state and local taxing jurisdictions in which it does business. Nationwide the number of independent taxing jurisdictions (states and the localities within them) easily exceeds seventy-five-hundred. AT&T, like most major corporations in America, does business in every state and the corresponding thousands of local taxing jurisdictions and as such serves as an involuntary tax collector for each of those governmental authorities.

AT&T, like every other business in the country, is legally obligated to serve as a collection agent for state and local taxing authorities. As the involuntary collection agent, AT&T is liable to the taxing jurisdiction if it fails to collect or undercollects taxes which a taxpayer owes to the state or local government. In addition, AT&T is liable to the taxing jurisdiction if it collects but does not remit all collected amounts to the taxing authority. Corporations, such as AT&T, consent to and accept the laws of the state and local governments when operating in the jurisdiction. AT&T relies on the legal structures of these jurisdictions to resolve controversies and provide protection from consumer refund suits.

Absent the decision by the Oklahoma Court of Appeals, undercollection liability to the taxing authorities would be the extent of AT&T's liability regarding the collection and remittance of taxes to state and local governments. Now, AT&T and other vendors also face liability for overcollection of taxes from customers on behalf of state or local government, notwithstanding the fact that AT&T is only an agent and no longer in possession of the money for which the plaintiffs seek a refund.

If it were possible to comply with the taxing statute and collect the correct amount from the right payers without fail, then AT&T would do so to avoid the risk of liability for

either overcollection or undercollection. AT&T attempts to comply with the state and local tax authorities to the best of its abilities. To that effect, AT&T, like other multistate businesses, spends many millions of dollars each year monitoring the multitude of various tax laws for each jurisdiction in which it operates. Each jurisdiction defines its own tax base, tax rate, rules for sourcing the transaction to determine where the tax is owed, rules for mathematical rounding, and a litany of rules for reporting and remitting collected taxes. Many jurisdictions may impose more than one tax on any particular transaction, thereby compounding the complexity of the applicable rules and reporting requirements. For instance, a typical phone bill may impose as many as three to four different types of taxes.[4]

In addition to the basic procedural and substantive imposition statutes, taxing jurisdictions (particularly at the municipal level) are notorious for regularly changing their tax rates and even worse, changing the boundaries of the taxing jurisdiction itself. While there are publications and software companies that attempt to capture the tax rates, and changes to those rates, imposed by each of the jurisdictions, there is no centralized source of information for businesses to use in determining tax jurisdiction boundaries and tracking their changes. Determining whether a particular address is inside a municipal taxing jurisdiction when the mailing address includes the name of the municipality but the physical location may or may not be inside the incorporated area is one of the most difficult areas of administering sales tax law. It is exactly this difficulty which the Oklahoma customers are attempting to exploit in the present class-action suit.

AT&T is merely attempting to comply with what the government requires of every corporate citizen; collect taxes from its customers based on the best information and software systems available and remit the collected amounts to

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[4] Federal, state, county and city for example.

the taxing jurisdiction. Because of the complexity of the state and local tax structure it is impossible for any business, including AT&T, to calculate, collect, and remit the government imposed taxes without error. The type of "zero margin for error" the plaintiff advocates, approved of by the Oklahoma Court of Appeals, puts AT&T in the position of choosing to expose itself to class-action liability for overcollection or liability to the state for undercollection.

AT&T and other similarly affected vendors acting as involuntary collection agents must evaluate the risk of these opposing liabilities. Clearly, a corporation seeks to limit all liability if possible, but in this instance a corporation can only limit one liability and accept exposure to the other. AT&T must choose between the lesser of two evils.

Exposure to liability to the thousands of taxing jurisdictions occurs on a jurisdiction-by-jurisdiction basis because liability attaches only after each individual jurisdiction audits a business' collection methodology and assesses the business on the undercollected amount. There is a certain "audit roulette" mentality inherent in evaluating the possible liability to taxing jurisdictions which almost certainly guarantees that the probability of facing liability in every jurisdiction is less likely (and thus less costly) than facing global liability for overcollection through class-action litigation as in the present case. By erring on the side of undercollection a company can eliminate class-action exposure entirely and face the audit risk that only a few of the local taxing jurisdictions would have the wherewithal to audit the company. In short, the Oklahoma decision creates an incentive for vendors to undercollect and play "audit roulette" rather than attempt to properly collect and remit to the states.

This disincentive to collect taxes on behalf of the government is a perversion of the state and local tax system and is anathema to our country's model of vendor collection on behalf of government. The system of taxation in this country

depends upon withholding taxes. Corporations collect these taxes not because they want to, but because of government requirements and imposition of liability for failure to comply. Allowing this decision to stand could cause this system to suffer in the future.

COST is not the only organization aware of and concerned with the impact of this decision. The decision concerns the states themselves. While the state of Oklahoma is not directly involved in this litigation, tax administrators involved in the Multistate Tax Commission (which includes Oklahoma as an Associate Member) voted to file an *amicus curiae* brief in support of AT&T's Petition for Certiorari. While both the MTC and COST have filed *amicus* briefs in each of the important tax cases in the past thirty years, this case represents the first time in those thirty years in which the MTC and COST will file an *amicus* brief in support of the same party.

As a representative of tax administrators throughout the country, the Multistate Tax Commission's concern lies with the violation of state sovereignty by the Oklahoma court. It is no wonder that the Multistate Tax Commission's members voted to support AT&T's Petition for Certiorari.[5] Even state tax administrators recognize that AT&T is acting as their collection agent and that the Oklahoma court completely ignored their states' statutory remedies for obtaining a refund and their states' prohibition on suits against the vendor.

There are two additional points to consider in evaluating whether to accept the Petition for Certiorari and overturn the decision in this case. First and foremost, this case is about taxes. Even though the plaintiffs presented, and the Oklahoma court accepted, a paradigm that their suit is not for a

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[5] Each of the twenty-eight states covered by the class certification here are members of the Multistate Tax Commission, including Oklahoma, an Associate Member. *See* http://www.mtc.gov/default.htm#membership.

refund of taxes paid, that is exactly what the plaintiffs seek. Put quite simply, absent the taxing statutes making AT&T an involuntary collection agent the plaintiffs would not have sued AT&T.

Unlike other types of class-action litigation, AT&T's behavior here is affirmative conduct driven by statutory obligation as an agent of the state. State and local jurisdictions' tax laws obligate businesses to collect taxes. State and local jurisdictions' tax laws specify how to handle challenges to and refunds of collected amounts. This case is a tax matter over which each sovereigns' tax statutes, not general liability for tortious behavior, should control.

Second, the vendors, including AT&T, acting as collection agents for the taxing authority do not financially benefit from their statutory obligation; vendors are legally obligated to turn over collected amounts to the appropriate governmental unit.[6] Even in the case of an erroneous overcollection, as plaintiffs contend occurred here, businesses turn over the "excess" amounts to the appropriate government authority.

Because the twenty-seven other states are not party to the litigation, never mind that the Oklahoma court specifically ignored the law in those jurisdictions, the decision of the Oklahoma court has no binding effect on the taxing authorities in each of the thousands of state and local jurisdictions impacted. Thus, adding insult to injury, if the decision below stands, AT&T is on its own in attempting to

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[6] AT&T's Petition makes reference to state provisions that allow businesses to recoup a small portion of the administrative costs associated with their tax collection duties. These vendor compensation provisions, as they are commonly called, exist in very few states (approximately eighteen) and even in the states where they do exist, the provisions do not come close to fully compensating retailers for the true expense involved in collecting the tax. Receipt of vendor compensation does not turn tax collection work into a profit center.

recoup from the taxing authority amounts possibly paid out as refunds to customers for overcollected taxes.

The ultimate result is that AT&T pays the collected amounts to the state and local governments (under a system so complex that no one and no software program can do the job with 100% accuracy), then refunds such amounts to the customers (and their class-action attorneys), and is then required to follow the administrative rules and law in each jurisdiction, with little hope, to obtain a refund from the state or locality. AT&T is thus subject to rules which the plaintiffs here are circumventing. The end result will be that AT&T is unable to recoup money that it refunded to the plaintiffs because of expired statutes of limitation, different interpretation of the state laws at issue, or the inefficiency of being forced to pursue claims in each of the thousands of jurisdictions – a job that the class-action members are trying to avoid. Finally, AT&T may be unable to obtain refunds in the various jurisdictions because of statutory provisions that ironically provide a remedy only to AT&T's customers.

## II. The decision by the Oklahoma Court of Appeals cannot stand because it failed to consider the decision of this Court in *Shutts* requiring the certifying court to apply the laws of the state in which each individual claimant resides.

The Oklahoma Court of Appeals' decision below violates this Court's holding in *Phillips Petroleum Co. v. Shutts et al.*, 472 U.S. 797 (1985). The Court in *Shutts* describes the circumstances under which the Due Process and Full Faith and Credit clauses require that a state court, when exercising jurisdiction over a nationwide class-action, apply the law of the states in which each individual claimant resides. The Oklahoma Court completely disregarded its constitutional obligation under *Shutts*.

In *Shutts* this Court reversed the decision of a Kansas court that improperly applied Kansas law upon nonresidents to

determine the value of their claims. Although the class-action itself was allowed to go forward, the Kansas Court was required to apply the laws of each state to determine the appropriate extent of the defendant's liability to non-Kansas residents included in the class. The Court held that application of Kansas substantive law upon nonresidents violated the constitutional limitations on choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution. In reaching its decision this Court stated:

> "Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests" in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate*, 449 U.S., at 312-313, 101 S.Ct., at 6390640. Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits"[7]

The Court found that Kansas law conflicted with the substantive law in other jurisdictions covered by the class certification, thereby making it inappropriate for the Kansas court to apply its own law to the claims of nonresident class members. In support of its decision the Court in *Shutts* used the example of an Oklahoma statute excusing liability for interest payments while Kansas law did not provide such protection. To then allow Kansas law to be applied to the entire class (including the claims of Oklahoma residents) could create liability for the defendant to Oklahoma claimants for which Oklahoma would not recognize as valid.[8]

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[7] *Shutts*, 472 U.S. at 821.

[8] *Id.* at 818.

The *Shutts* rational requires that the Oklahoma court here apply the substantive law of the other twenty-seven states included in the certified class. The Oklahoma court failed to consider that some individual states' substantive law prohibits customers from making such claims against the vendor.[9] The Oklahoma court also failed to consider that some individual states' substantive law prohibits class-action litigation for overcollected tax.[10] While *Shutts* involved conflicts of law over the amount of each claim (as determined by state law) this suit presents an even more compelling conflict in state law—over the very existence of a claim against the vendor or ability to sue vendors in class-action.

Each state enacts its own set of administrative rules governing claims for the refund of taxes. A court lacks jurisdiction to consider the merits of a taxpayer's claim unless and until a claimant meets a states' statutory requirements for exhausting administrative remedies and attempting to resolve the matter through set administrative channels. By asserting its jurisdiction to hear the claims of a nationwide class, the Oklahoma court ignored the statutory schemes and procedures put in place by each of the twenty-seven other states

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[9] *See Davidson v. Rochester Tel Corp.*, 558 N.Y.S.2d 1009, 1011 (App. Div. 1990) (holding that "[a] dissatisfied taxpayer's recourse is . . . against the taxing body" not the vendor.); *Serna v. H.E. Butt Grocery Co.*, 21 S.W.3d 330, 333 (Tex. Ct. App. 2000) (Texas law does "not contemplate direct action against the vendor who collects the sales tax on the state's behalf."); Texas Tax Code Ann. § 112.53(a) (specifies suits for refunds must be against the comptroller and attorney general.); *P.R. Mktg. Group Inc. v. GTE Fla., Inc.*, 747 So.2d 962 (Fla. Dist. Ct. App. 1999) (holding in the case of tax refund claims, other than the constitutionality of the tax, the Florida Tax Code administrative remedies are the exclusive remedies.)

[10] *See City of Phila. v. Cohen*, 184 N.E.2d 167, 169 (N.Y. 1962) ("[f]or our tribunals to sit in judgment on a tax controversy between another State and its present or former citizens would be an intrusion into the public affairs of another State."); *Ferguson v. Kroger Co.*, 37 S.W.3d 590, 592 (Ark. 2001) (a state court is "without jurisdiction to order the treasuries of another state to refund tax revenues.").

regarding their methods to resolve tax disputes. Oklahoma justifies its action by seeking to frame the issue as non-tax, but clearly absent the tax statutes mandating AT&T to collect taxes there would be no overcollection of tax to resolve.[11]

Application of Oklahoma law to all members of the class-action violates the constitutional principles articulated in *Shutts*. Use of Oklahoma's substantive law (allowing suits against the vendor and class-action certification) will result in liability to claimants in other states who, under their own states' laws would not have a claim. Application of Oklahoma law across 27 other states is accordingly "sufficiently arbitrary and unfair as to exceed constitutional limits" as it was to apply Kansas law to other states in *Shutts*.

Furthermore, in the context of fairness this Court looks to the expectations of the parties. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 333 (1981). In *Shutts*, the Court considered the fact that when the parties executed the leases, the parties outside of Kansas had no expectation that Kansas law might control.[12] Thus, while neither the Due Process nor the full faith credit clause requires a state, such as Oklahoma, to substitute the conflicting laws of another state to determine the outcome of an Oklahoma decision regarding persons and events within the state, *Pacific Employees Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939), Oklahoma "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930).

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[11] Clearly AT&T does not want to be a tax collector for governments. As a collector, AT&T is not fully compensated for the cost, is subject to under-collection liability and now, facing this decision, is open to class-action attack. If there is any question that vendors do not want to collect taxes, one only need look at the multitude of cases in which vendors seek to avoid nexus and the requirement to collect use tax.

[12] *Shutts*, 472 U.S. at 822

Turning to AT&T, there could be no possible expectation of having to defend against a lawsuit in Oklahoma from plaintiffs in other states involving tax collection statutes in such other states. In other words, AT&T should be able to expect enforcement of tax collection statutes by each state and within each state, and not on terms dictated by an Oklahoma court under Oklahoma law. Each state has its own rules, regulations and standards dealing with vendors and taxpayers. It is only reasonable for businesses and taxpayers in a state to expect that their state's law will govern their conduct.

While, the Court in *Shutts* held that nationwide certification was allowable under Due Process, the Court reiterated that the plaintiffs consent to jurisdiction had no impact on the choice of law, else it would create an open invitation to forum shop.[13] In *Shutts*, Kansas sought to apply its law on the theory that the law of the forum state controls absent a compelling reason to use another state's law; this Court rejected the argument as "bootstrapping". Class-action statutes require a common issue of law or fact, and while a state can assume jurisdiction over a plaintiff whose principal contacts are with another state, the assumption of jurisdiction has no place in determining the application of substantive law. A state "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law."[14]

A similar issue exists in the current case. Oklahoma justifies certifying the class as having common questions of law based on its review of Oklahoma law (which it incorrectly believes allows class-action litigation against vendors for overcollected sales tax) and completely ignores

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[13] *Id.* at 820.

[14] *Id.* at 821.

the law in the remaining twenty-seven states. While all of AT&T's customers may be making a claim based on similar facts (living outside the technical boundary of a municipal taxing jurisdiction), legally each state defines differently the existence or nonexistence of the consumer's claim, and who the claim may be made against. In particular, many of the states covered by the certification here have distinct legal structures that control whether a customer can sue a vendor or utilize class-action litigation to pursue a claim for overpaid sales taxes. Some of the states specify that such claims may only be made against the taxing authority (which in fact has received the money).

A fact about this case (and all other similar class-action suits for overcollected tax) that distinguishes it slightly from *Shutts*, (where there was a single defendant subject to claims by multiple plaintiffs) is that AT&T is representing the interests of the thousands of true defendants in the case (the tax administrators from each jurisdiction engulfed in the class-action). In *Shutts*, there was one defendant being brought into one Court in one State where at least the defendant and a couple of the plaintiffs had a connection to the state; even so, this Court held that the law governing the claimants against that defendant must be the law of each state from which the claimants hailed. In the present case the defendant is the surrogate for the thousands of tax administrators from twenty-seven other states and related thousands of local jurisdictions within those states. Here the claimants themselves and the real (though not present) defendants are all from states that have no connection to Oklahoma.

The Court's analysis in *Shutts* requires application of the substantive law of the state of the claimant when failure to do so would violate the constitutional protections afforded the defendant. In *Shutts* the issue was the application of interest rates to determine the value of the individual claims. In the current situation certification should not have occurred because the substantive law of some of the states included in

the class-action declares that no action may lie against the vendor. This Court must review the Oklahoma court's decision and apply *Shutts* to clearly articulate a standard for class certification which protects the right of individual states to administer their own tax code and to insulate vendors serving as collection agents from suits for tax refunds when the funds involved were collected in trust and turned over to the taxing authority. Federalism allows states to define protections for their businesses and citizens. Due Process and the Full Faith and Credit clause require states to respect each others choices.

The Oklahoma court decided that tax refunds may be obtained from vendors via class-actions in that state, (although contrary to the state's own statutory provisions). That decision is the province of Oklahoma law as applied to Oklahoma residents. What this Court must prevent is Oklahoma applying its legal standards in other states to determine the interaction and legal relationships between their taxpayers, vendors (as collection agents), and their taxing authorities. If a state chooses to grant immunity to its vendors, Oklahoma has no right to interfere with that sovereign decision.

## III. The sales tax complexity underlying the litigation is one of the subjects addressed by the Streamlined Sales Tax Project, a national effort currently underway to simplify the sales tax structure pursuant to this Court's decision in *Quill*.

The Streamlined Sales Tax Project (SSTP) is an effort to simplify and rationalize the sales tax structure that involves forty-two of the forty-six states (including the District of Columbia) which impose a sales tax.[15] Of the twenty-eight

[15] Information about the Streamlined Sales Tax Project can be found on the project's website at http://www.streamlinedsalestax.org. The site includes a copy of the multistate simplification Agreement and information about the participating states.

states covered by the class-certification, all but two (Colorado and Alaska), are part of the simplification effort. The SSTP is an attempt to simplify the sales tax structure in an effort to implement this Court's requirement in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), that the states not burden interstate commerce in their effort to require remote vendors to collect sales tax for all states. While the issue of remote collection of sales tax is not relevant to the present litigation, the simplification effort itself recognizes the role that businesses have played as the collection agents for state and local government. In that regard, the effort seeks to simplify (on a nationwide basis) state and local sales tax structures by requiring all taxing authorities to use uniform base definitions, uniform sourcing rules, limited number of rates per jurisdiction, and requires numerous other uniform administrative procedures. To the extent that the effort does not simplify the sales tax system (it still allows each local jurisdiction to impose its own tax as opposed to proposals that would allow only one sales tax rate per state) the simplification effort promises to provide software to calculate, report, and remit the sales tax for vendors. The system being developed promises that states will provide a zip-plus-four database of tax rates by jurisdiction and, for vendors who rely on state provided data and software, the states promise to hold vendors harmless for errors in tax calculation and remittance. In addition, the states have provided specific refund procedures for customers to follow before any cause of action may accrue.[16]

While Oklahoma is one of the states participating in the simplification effort, its statutory changes (including the hold

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[16] *See* Diane L. Hardt, Douglas L. Lindholm & Stephen P.B. Krantz, *The Lawmaker's Guide to the Streamlined Sales Tax Project 2003, The Year of Decision* (2003); Streamlined Sales Tax Agreement, §§ 306 and 325, *available at* http://www.streamlinedsalestax.org/FinalAgreement Adopted11-12-02.pdf.

harmless for vendors and the customer refund procedures) did not take effect until November 2003.[17] Accordingly, the SSTP hold harmless provision was not argued below. Even so, the Oklahoma Court of Appeals refused to even consider the law in the other twenty-seven states (including the 25 SSTP participants) and whether those sovereign jurisdictions had chosen to protect their tax collectors (businesses) from the type of litigation and potential liability that now threatens AT&T.

The Oklahoma decision threatens the balance of power that exists in our federalist system and threatens the progress that has been made implementing this Court's guidance in *Quill*. While Oklahoma courts are free to ignore their own statutory provisions (which can be addressed by the state's legislative process), allowing an Oklahoma court to ignore the statutory protections that other states have granted their taxpayers cannot be remedied by the states themselves and must be addressed here.

## CONCLUSION

Local, State and Federal governments alike are dependent upon revenues raised by taxes to provide services. A multitude of tax systems within the United States function based on withholding and remittance by businesses; income taxes, sales taxes, gross receipts taxes, unemployment taxes, employment taxes, social security taxes, alcohol and cigarette excise taxes, motor fuel taxes, to name a few. Absent withholding, it is unlikely that any level of government would receive the necessary amount of tax to meet its fiscal obligations. States understand that in forcing vendors such as AT&T to choose between two evils, exposure to class-action or exposure to audit risk, vendors must select the least likely and least expensive risk, the lesser of two evils. In the

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[17] Streamlined Sales Tax System Act, 2003 Okla. Laws 413

present situation that means vendors will err on the side of undercollecting sales tax to avoid nationwide class-action exposure. The result is a clear threat to established compliance expectations for government.

If compliance with the complexity of the sales tax structure in over 45 states, DC, and thousands of local jurisdictions were possible, then vendors could collect without fear of exposing themselves to a class-action suit for over-collection. Reality demonstrates that AT&T or any other vendor relying on customer addresses in making taxability determinations will be unable to tax with 100% accuracy.

AT&T merely is a collection agent; the proper defendant is the applicable taxing authority. A customer can seek a refund from the taxing jurisdiction by following the appropriate administrative process, while this does not aid the class-action bar; it is the proper way to administer a refund. AT&T never benefited from the collection of the sales tax from the consumer, so they should not be subject to granting refunds for money not in their possession—AT&T merely collected per instructions from the taxing authority.

Additionally, this Court should consider not just the impact of this case, a sales tax collection case, but for taxes in general. Allowing this ruling to stand could also impact other taxes. The impact could have a crippling effect not just on the collectors forced to return money they do not possess, but also on the taxing jurisdiction because collection agents will under-collect to protect themselves from class-action litigation.

For the reasons stated above, COST respectfully requests the Court to accept this case for review.

Respectfully submitted,

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No. 03-1046

IN THE

# Supreme Court of the United States

AT&T CORP.,

*Petitioner*,

v.

BOBBY GENE ALLEN, ET AL.,

*Respondent*,

**On Petition for Writ of Certiorari to the Oklahoma Court of Civil Appeals**

## BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

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## BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

### INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members and sixteen States are associate members.[2] The Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978).

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems.[3] The States' initial interest in forming the COMPACT was to safeguard state taxing power in the context of multistate commerce, an essential

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[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its members States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. Finally, this brief is filed pursuant to the consent of the parties, filed herewith.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, West Virginia and Wisconsin.

[3] The Willis Committee, sanctioned by Part II of PUB. L. 86-272, 73 STAT. 555, 556 (1959), extensively studied how Congress might regulate State taxation of interstate commerce.

governmental power for States to fulfill their constitutional role. To this end, the Commission reviews state court decisions that impact state tax sovereignty to determine whether a given decision can have a perverse affect. The Oklahoma Court of Civil Appeals has issued such a decision, directly denying the sovereign interests of sister States.

The right of a State to require the exhaustion of administrative remedies as a condition to a waiver of its sovereign immunity from tax refunds suits in courts of general jurisdiction is a foundational aspect of state tax sovereignty. In addition, to enhance the efficient functioning of state tax systems, States have chosen to provide vendors—burdened with the obligation of collecting the government's tax—statutory protection from refund suits by the taxpayer-consumer. Tax systems work best when agencies can gain willing cooperation from those responsible to collect and pay over the tax. Protecting vendors from suits enhances that cooperation. Moreover, permitting tax disputes to be litigated in court actions between vendors and customers without participation of the tax agency defeats the purpose of establishing special tax administration procedures. The decision below impairs these legitimate State tax policies.

Oklahoma's certification of a class that includes nonresidents from States that forbid a court action of this kind raises issues of vital importance to States, and yet no State is party to the action. Your amicus represents the interest of States in asserting their tax sovereignty rights. Of the 27 other States affected by the class certification of the Oklahoma court, ten are full compact member States, three are sovereignty member States and ten are associate member States.

## ARGUMENT

### I

### IN CERTIFYING THE PLAINTIFF CLASS, THE OKLAHOMA COURT VIOLATED THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES BY OVERRIDING THE SOVEREIGN IMMUNITY OF SISTER STATES THAT BAR TAX REFUND SUITS UNLESS THEIR ADMINISTRATIVE REMEDIES ARE EXHAUSTED

#### A. Choice of Law Rules under the Due Process and Full Faith and Credit Clauses Require Oklahoma to follow the Law of the State of Nonresident Plaintiffs in Determining Jurisdiction for Purposes of Class Certification.

The Oklahoma trial court certified a plaintiff class that includes AT&T customers who lived outside city limits in 28 States but were charged municipal taxes. The court applied Oklahoma law to all plaintiffs, heedless of the fact that many nonresident plaintiffs with no contact with Oklahoma live in States that have asserted their statutory sovereign immunity to bar such suits.

Recent Supreme Court choice-of-law jurisprudence describes the constitutional limits on a forum's choice to apply its own law.

> [T]he Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state in-

> terests, such that choice of its law is neither arbitrary nor fundamentally unfair."

*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312 (1981).

*Shutts* was a Kansas class action involving residents of all 50 States seeking interest on delayed royalty payments from natural gas production in Kansas and 10 other States. Only a small percentage of the plaintiffs or the production was in Kansas. The Court ruled as a matter of constitutionally compelled choice of law that the Kansas court did not have sufficient contacts with nonresident class members owning properties outside Kansas to permit the Kansas court to apply substantive Kansas law setting interest rates. 872 U.S. at 822.

In *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), an interest-on-royalty case factually similar to *Shutts*, the Court held that it was permissible for Kansas to choose forum law to apply its five year statute of limitations to nonresident class members because the statue of limitations is procedural, not substantive. The Court acknowledged that the "substantive-procedural dichotomy in the context of the Full Faith and Credit Clause" functions simply "to *delimit spheres of state legislative competence*." *Id.* at 727 (emphasis added).

In its most recent choice-of-law decision, *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003), the Court affirmed that the Full Faith and Credit Clause did not compel Nevada to substitute the statutes of another State for its own statutes dealing with a subject matter concerning which Nevada was competent to legislate. Nevada's *competence to legislate* arose from the fact that the alleged tortious activity occurred in Nevada.

The crux of the *Shutts* holding has thus been reinforced by these two later cases. The forum in a multistate class ac-

tion cannot apply substantive forum law to nonresident class plaintiffs who have no connection with the forum State because the forum State *lacks competence to legislate substantive law* for those nonresidents.

Oklahoma is not competent to legislate about tax refunds for other States' residents on transactions occurring in those States. Under *Shutts*, *Wortman* and *Hyatt*, the due process and full faith and credit clauses require Oklahoma to apply the substantive law of the other States. A State has no more "substantive" provision of law than its statutory assertions of its sovereign immunity to specify tax administration remedies and to bar suits in court by taxpayers who have not exhausted those remedies. Oklahoma may not include plaintiffs from those States as part of the certified class.

**B. Assertions of State Sovereign Immunity to Bar Taxpayers from Suing Vendors Regarding Tax Collections or from Bringing Court Actions for Tax Refunds Prior to Exhausting Administrative Remedies is Vital to Protect State Tax Policy.**

Class plaintiffs are suing AT&T to obtain the return of erroneously collected municipal taxes as damages in an action for restitution and breach of contract. AT&T had duly paid the tax over to the tax agencies. The Oklahoma Court of Civil Appeals described the action as one that "concerns the validity of a municipal sales tax charge included in their monthly long distance bill." Appendix to Petition (App.) at 2a.

In their motion to certify the class, however, named plaintiffs argued that this is not a tax refund case implicating refund procedures. Even though AT&T wrongly collected a tax that was not owed and plaintiffs want that tax refunded, plaintiffs focus on AT&T's error. The trial court found, and the appellate court affirmed, that this was not a tax refund action under Oklahoma law. Plaintiffs' failure, therefore, to

exhaust the administrative tax proceedings did not deprive the trial court of subject matter jurisdiction.

Other States whose residents were certified as part of the class would treat this lawsuit as a tax refund action. States like New York, Texas, Pennsylvania, Florida, and others cited in the Petition at 18-21 require that any claim that implicates a tax refund must be brought against the State—not the business that collects and pays over the tax—and must be brought first to the administrative forum or special court established as a statutory condition for the waiver of sovereign immunity for any subsequent tax refund suit in a court of general jurisdiction.

States require exhaustion of administrative remedies and bar suits against vendors for a number of reasons. Of primary importance is the ability of States to safeguard their fisc. Taxes are the crucial lifeblood of any government. This Court, in a distinguished line of cases thoroughly rehearsed in the Petition at 12-14, has repeatedly affirmed the importance of state taxes as an essential element of state sovereignty and the firm policy against interference with state tax procedures.

Those procedures enhance administrative efficiency. Millions of refunds are sought annually. An administrative forum acts as a filtering mechanism to dispose of the great bulk of tax refunds, protecting the court system from needless litigation. These specialized administrative forums are familiar with the intricacies of tax laws and can bring well-developed expertise to bear on this complex and vital subject in an efficient and expeditious manner.

Using administrative refund procedures remains important even where consumers are complaining about a vendor's failure to figure the tax correctly—whether though inattention, unwillingness to fund the necessary resources, or even

outright fraud. For as long as plaintiffs are challenging "the validity of a municipal sales tax charge," as the Oklahoma court described the action here, and are seeking a refund, the State has a crucial interest in ensuring it tax agency is party to the dispute and normal tax remedies are followed to determine whether the tax was collected erroneously.

Insulating vendors from the burden of litigation over refunds furthers an efficient tax system. The States already impose on the vendor the burden of collecting and paying over the government's taxes. To better ensure their wholehearted cooperation, States have reasonably chosen to protect their vendor from being caught in the middle of disputes between consumers and the State over whether a tax is properly due.

The Oklahoma court did not "misconstrue" the laws of these other States.[4] It affirmatively acknowledged that precedent from several States would treat this action as a claim for a tax refund, would bar taxpayers from bringing suit against a vendor-collector rather than the tax agency, and would require exhaustion of administrative remedies prior to court action. "Some jurisdictions have addressed the alleged overcharge of sales tax by companies providing telephone service and held that administrative remedies must first be exhausted before judicial relief can be sought." App. at 4a-5a.

The Oklahoma court simply disregarded the policy interests and statutory mandates of these other States. Instead of excluding residents of those States from the certified plaintiff class or denying class certification due to a lack of common-

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[4] *See Wortman*, 486 U.S. at 730-31 ("To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.")

ality, the court denied any conflict of laws existed. It focused exclusively and narrowly on the similarity in state tax laws under which a city tax can never apply to residents or transactions outside city limits. App. at 11a and fn. 6. The court ignored altogether the larger and more important jurisdictional aspect of the tax laws of sister States that ensures the efficient running of their state tax systems and protects their fisc through required exhaustion of administrative remedies.

In affirming certification of a plaintiff class that includes residents of these other States, the Oklahoma court exceeded due process and full faith and credit limits on Oklahoma's competence to legislate for nonresident class members. It improperly disregarded the law of the other States, impairing their sovereign right to govern their own tax processes. This Court is the only shield available to these other States.

## II

## THIS COURT HAS JURISDICTION UNDER THE EXCEPTIONS TO FINALITY IN *COX BROADCASTING CO. V. COHN*, 420 U.S. 469 (1988), AND STANDARDS FOR APPEAL OF CLASS CERTIFICATION DECISIONS DEVELOPED UNDER FED. R. CIV. P. 23(f).

Since 1789 Congress has granted the Court jurisdiction to review state court litigation only after the highest state court had rendered a final judgment or decree. 28 U.S.C. 1257. In *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975), the Court collated into four categories various exceptions to that finality requirement. Jurisdiction to grant this interlocutory review is provided under three of the four categories.

"In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another . . . the out-

come of further proceedings [is] preordained." *Id.* at 479. As in *Mills v. Alabama*, 384 U.S. 214 (1966) (only defense to proscribed publication was First Amendment claim), the outcome here is preordained. AT&T has acknowledged charging municipal tax to customers living outside city limits. The Oklahoma court underlined the obvious point that municipality cannot tax transactions that occur outside the municipality. There is no question but the plaintiffs are entitled to a refund. The jurisdictional question implicated by the correct application of federal choice-of-law restraints under due process and full faith and credit—which requires Oklahoma to respect the exhaustion requirements of sister States—will persist regardless of sending the case back for trial.

Indeed, that persistence is the core of *Cox*'s second category "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. The Oklahoma court looked at the different laws of sister States and decided to ignore them. That decision has been affirmed by the Oklahoma Court of Civil Appeals and let stand by the Oklahoma Supreme Court. There is no basis to believe that the Oklahoma courts will suddenly change their minds about the law applicable to class certification. The error in class certification results entirely from faulty legal analysis, not a complex factual calculus. Because AT&T acknowledges the factual error in charging customers a tax it should not have, the outcome of future state court proceedings will not alter the need for this Court to decide this jurisdictional issue in the class certification.

Lastly, this case most clearly qualifies as an exception to the finality requirement under the fourth category "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action."

420 U.S. at 482-83.[5] *Shutts* compels Oklahoma to apply the law of sister States to nonresident class plaintiffs. The relevant cause of action under the law of sister States is a tax refund action. The statutory invocation of sister States' sovereign immunity to require protection for vendors and exhaustion of administrative remedies is preclusive of any further litigation on that relevant cause of action for residents of those States.

The Court in *Cox* cited *Construction Laborers v. Curry*, 371 U.S. 542 (1963), as an exemplar of the fourth category. In *Curry*, federal labor policy preempted state jurisdiction to hear a picketing case properly before the National Labor Relations Board. As the Court in *Cox* articulated, the interlocutory appeal in *Curry* was proper because

> the power of the state court to proceed in the face of the preemption claim was deemed an issue separable from the merits and ripe for review in this Court, particularly "when postponing review would seriously erode the national labor policy requiring the subject matter of respondent's cause to be heard by the Board, not by the state courts."

420 U.S. at 483, quoting *Curry*, 371 U.S. at 550. The same reasoning applies here. Federal policy safeguards the exclusivity of jurisdiction for State tax administrative proceedings. That policy derives from principles of federalism and comity under the Constitution and has been reinforced by Congress in the Tax Injunction Act and this Court in cases like *National Private Truck Council, Inc, v. Oklahoma Tax Commis-*

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[5] The third category in *Cox*, inapplicable here, concerns cases where the federal issue has been finally decided, but "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id* at 481

*sion*, 515 U.S. 582 (1995). To paraphrase *Curry*: "postponing review would seriously erode the national [federalism] policy requiring the subject matter of respondent's cause to be heard [in the other States' tax administrative forums], not by the [Oklahoma] state courts."

This case is also strikingly similar to another fourth category case cited in *Cox*. In *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), the banks asserted that "a special federal venue statute immunized them from suit in Travis County and they could be sued only in another county." 420 U.S. at 483. Here, required exhaustion of other States' tax administrative procedures immunize AT&T and tax agencies from suit in courts. The issue of other States' sovereignty, like the issue in *Langdeau*, may be "entertained as a 'separate and independent matter, anterior to the merits, not enmeshed in the factual and legal issues comprising the plaintiff' cause of action.'" 420 U.S. at 483-84, quoting *Langdeau*, 371 U.S. at 558.

Jurisdiction of this Court to review the Oklahoma court decision plainly fits within the exceptions to finality in *Cox*. Further persuasive reason to hear this case comes from developing standards for discretionary appeals from class certification decisions by federal district courts.

In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court granted certiorari and reviewed an interlocutory appeal of class certification. That action sought a global settlement of current and future asbestos related claims. The Court agreed that "because [resolution of class certification issues] here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first." *Id.* at 612. The Article III issues—standing, subject matter jurisdiction, and justiciability—were jurisdictional, and yet the Court dealt first with class certification.

Here, the jurisdictional issue—the lack of subject matter jurisdiction over tax issues arising in States that require exhaustion—coincides with the class certification issue and has long enjoyed the assiduous respect of this Court. Interlocutory review is similarly appropriate here.

The dissent in *Amchem* objected to the interlocutory resolution of the class certification issue because such "highly fact based, complex, and difficult matters [were] inappropriate for initial review before this Court." *Id.* at 630. No such potential obstacle exists here. The bar to class certification is neither complex nor fact-based. It derives from a straightforward analysis of the tax and sovereign immunity statutes of the other States. Named plaintiffs are obliged to present exactly that information to the court on their motion to certify the class. *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C. Cir. 1986).

A spate of recent opinions from U.S. Courts of Appeals[6] has developed standards for when an interlocutory appeal of a class certification is prudent under the newly-minted authority of FED. R. CIV. P. 23(f).[7] This building exegesis is

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[6] *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999); *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000); *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000); *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154 (3d Cir. 2001); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001); *In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002).

[7] FED. R. CIV. P. 23(f) reads as follows: "A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."

pertinent to the Court's decision whether to grant certiorari. Indeed, several of the decisions quoted the Advisory Committee's comment that the standard for entertaining an appeal under Rule 23(f) is "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." *Blair*, 181 F.3d at 833; *Prado-Steinman*, 221 F.3d at 1272.

The circuit courts have identified two basic categories where an interlocutory appeal is appropriate. First are the so-called "death-knell" situations where the certification decision will end the litigation either because a named plaintiff denied class certification has too little at stake to proceed, or a defendant facing a large certified class will be forced to settle. The second category focuses on the nature of the issues raised and suggests five factors that weigh toward appeal: (1) unsettled and fundamental issues of law relating to class actions; (2) issues likely to evade end-of-the-case review; (3) a class certification decision that is manifestly erroneous; (4) a case that involves the public interest or a governmental entity; or (5) when similar issues are arising in related actions. *Lorazepam*, 289 F.3d at 104-105. All five factors favor granting review here.

The Petition for Certiorari involves a fundamental and unsettled issue concerning the impact of federalism, state sovereignty, and state tax policy on class certification decisions. This Court has repeatedly affirmed that state tax systems are an essential attribute of state sovereignty and that noninterference in state tax administration procedures is critically important. The application of the constitutional choice-of-law ruling in *Shutts* implicates a fundamental assertion of state sovereign immunity with regard to state tax policy. This Court represents the only protection for States against Oklahoma's violation of these crucial sovereignty interests.

End-of-case review is inadequate to protect the interests of the States. Allowing Oklahoma to proceed with plaintiffs from States which reserve initial jurisdiction on tax matters exclusively to an administrative process would, itself, deny state sovereignty interests for the vindication of which review is sought. *See Helstoski v. Meanor*, 442 U.S. 500, 506-07 (1979) (Speech and Debate Clause); *Abney v. United States*, 431 U.S. 651, 662 (1977) (double jeopardy).

A number of courts have placed special weight on the third factor, suggesting "this factor should be viewed on a sliding scale. The stronger the showing of an abuse of discretion, the more this factor weighs in favor of interlocutory review."[8] Indeed, that view echoes this Court's response to the dissent's assertion in *Amchem* that the many complex issues counseled delay in reviewing class certification. "If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger." 521 U.S. at 613, n. 15.

Rarely does an avid appellant doubt a lower court's decision was manifestly erroneous. But the error below looms particular large here given the clarity of the choice-of-law standard laid down by this Court in *Shutts* and the blithe willingness of the Oklahoma Court of Civil Appeals to cite and ignore the laws of those sister States that require exhaustion of administrative remedies and bar suits against vendors. This manifest error alone justifies granting certiorari.

The fact and nature of the governmental interest implicated here, the fourth factor, completely escaped the Oklahoma courts. While Oklahoma may not regard this suit as

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[8] *Prado-Steiman*, 221 F.3d at 1274-75 & n. 10; *see also Lienhart*, 255 F.3d at 145-46; *Newton*, 259 F.3d at 165; *Lorazepam*, 289 F.3d at 105 ("the more questionable the district court's decision, the less the remaining four factors need weigh in.")

one against the sovereignty interests of the State, a number of her sister States do.

Finally, similar issues are arising in related actions. Recently, the Illinois Court of Appeals affirmed a class certification including residents of Illinois and 17 other States in an action against a telephone company for erroneously collecting municipal sales tax from residents outside city limits. *P.J.'s Concrete Pumping Service v. Nextel West*, No. 2-02-1219 (Ill. Ct. App. 2nd Div., Jan. 27, 2004). The Illinois court likewise ignored the choice-of-law rules that required it to consider the law of its sister States in certifying the class to include nonresident defendants with no aggregation of contacts with Illinois—law that bars exactly that kind of suit.

Review by this Court at this stage is not only fully within the Court's jurisdiction and within prudential criteria favoring early review of certain class certification decisions, but it offers the only source of protection for state sovereignty interests.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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